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NOMINATION OF SHERMAN E. UNGER

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

THE CONFIRMATION OF SHERMAN E. UNGER TO BE A JUDGE FOR THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

OCTOBER 27, 1983

THIRD AND LAST PART

Serial No. J-98-67

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NOMINATION OF SHERMAN E. UNGER—Part 3

THURSDAY, OCTOBER 27, 1983

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 1 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin Hatch (acting chairman of the committee) presiding.

Also present: Senators Specter and Metzenbaum.

Staff present: Robert Short, chief investigator, Joseph Kopka, investigator, and Stephen Johnson, counsel, Subcommittee on Juvenile Justice.

OPENING STATEMENT OF SENATOR ORRIN G. HATCH

Senator HATCH. We are happy to proceed with our last hearing on the confirmation of Mr. Sherman E. Unger to be U.S. circuit judge for the Federal circuit.

It is my understanding that we have Mr. Morris Berger, an attorney from Pittsburgh, Pa., and Mr. Michael Hahalyak, attorney from Pittsburgh, Pa., who would like to enlighten the committee concerning certain questions that have been raised.

We are happy to welcome you here. We will take Mr. Berger's testimony first and then Mr. Hahalyak's.

We will swear you both in. We swear in all witnesses at confirmation hearings.

Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth so help you God?

Mr. BERGER. I do.

Mr. HAHALYAK. I do.

Senator HATCH. Thank you.

If I could get you two gentlemen to indulge me for 5 minutes, Senator Specter from your State would like to be here for your testimony. I would like him to be here, if possible.

[Whereupon, a short recess was taken.]

Senator HATCH. I will call Mr. Oakley Hunter at this time. We will hold off on the testimony of Mr. Berger and Mr. Hahalyak for a little while.

This marks the 5th day of hearings on the proposed nomination of Mr. Sherman Unger to be U.S. circuit court judge for the Federal circuit.

As we all know, he currently serves as the General Counsel for the U.S. Department of Commerce. I think during these hearings, we have made a real effort to be fair to both Mr. Unger and to those who have opposed his nomination, notably the American Bar Association.

We have heard many hours of testimony from those with varying perspectives on this nomination. Everyone who has requested an opportunity to address this committee on the qualifications of Mr. Unger has been allowed such an opportunity.

It is the intention of this committee to complete its hearings this afternoon on Mr. Unger's nomination.

During today's proceedings, we are going to hear a summation of the case against Mr. Unger delivered by Mr. William Coleman, who represents the ABA's Standing Committee on the Federal Judiciary.

Before we hear Mr. Coleman, however, we will hear the testimony of Oakley Hunter, Morris M. Berger, Michael Hahalyak, and Bonita Buerk.

So at this time, let us proceed with Mr. Hunter. We will swear you in as well.

Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth so help you God?

Mr. HUNTER. I do.

Senator HATCH. You may proceed. How long do you expect your testimony to take?

Mr. HUNTER. I am here to answer any questions. I did not request or volunteer. I received a telephone call from staff asking me to appear here at 1.

Senator HATCH. I understand that you are here at the request of Senator Metzenbaum.

Mr. HUNTER. I have no statement.

Senator HATCH. I understand. Senator Metzenbaum apparently has questions to ask you and he is not here.

Mr. Berger and Mr. Hahalyak, how long will your testimony take?

Mr. BERGER. About 20 minutes.

Senator HATCH. Can you summarize in 10 minutes?

Mr. BERGER. I do not think so.

Senator HATCH. And you, Mike?

Mr. HAHALYAK. Probably about the same time.

Senator HATCH. Do you have any statements to submit?

Mr. BERGER. No.

Senator HATCH. Well, I do not want to cut down your testimony, but also I do not care to be here all day either.

Apparently Mr. Hunter is prepared to answer questions but does not have a statement. Let us start with Mr. Berger, and we will summarize for Senator Specter when he arrives.

STATEMENT OF MORRIS M. BERGER, ATTORNEY, PITTSBURGH, PA.

Mr. BERGER. I am Morris M. Berger of the city of Pittsburgh. I have practiced law in that county and many other courts for a matter of 55 years.

Senator HATCH. Are you associated with a law firm there, Mr. Berger?

Mr. BERGER. My law firm, I am a senior member of it, is Berger, Kapetan, Malaroff & Meyers.

In the year of 1971, B. W. Morris, a client of Mr. Sherman Unger, both of Cincinnati, Ohio, retained a promotion company of Pittsburgh, Pa., to obtain investors for the purpose of funding the construction of an apartment complex to be built in Lexington, Ky., on land owned by Morris or his solely owned Texas corporation known as Unit, Inc., and by a coowner named Blum.

The promotors obtained a number of business and professional people in Pittsburgh who invested collectively a total of $564,000 for which they were to receive limited partnership shares at the rate of $23,500 per share in the limited partnership.

The partnership agreement provided that it would be subject to the laws of Kentucky and the certification of partnership was signed by the parties and recorded in Kentucky.

The holdings were as follows: Unit, Inc., general partner and limited partner as well with a limited partnership ownership of 12.5 percent; a Mr. Blum, a special limited partner with a 12.5 percent share in the partnership; and all other limited partners including Berger and Kapetan, my firm, and Michael Hahalyak, owned collectively 75 percent of the limited partnership.

Senator Hatch. Did your law firm and Mr. Hahalyak have interests in Unit, Inc., as limited partners?

Mr. Berger. That is right.

Our combined ownership is $70,500.

The partnership was named B&B Properties, a limited partnership, and subscriptions were paid in simultaneously with the conveyance of the land to B&B Properties. Unit was designated as a general partner and manager of the partnership business.

B. W. Morris, as a sole stockholder and officer of his corporation, Unit, Inc., took control of the affairs of the limited partnership and thereafter managed its operations.

The complex consisted of 238 units which became known as Patchen Place. The partnership agreement and the certification provided that the partnership should continue for 50 years until the year 2021 A.D. unless sooner terminated by the partners.

Patchen Place and the operation were created for the promotion of the purposes of the partnership. A mortgage was obtained from FHA on the basis of a low-income housing project and all the partners covenanted with each other and with FHA that the project and its financing was for the purpose of retaining it for investment and not for resale.

The Patchen Place apartments were completed on or about 1972 and Morris took control of the management. From the very beginning, the operation was successful in every way. The rentals were sufficient to pay mortgage interest and principal, taxes, insurance, maintenance, a staff of employees, improvements and even management fees and expenses which Mr. Morris and Unit, Inc., took out of the operation even though this was prohibited by the partnership agreement.

In 1975, Unit, Inc., with Mr. Sherman Unger as counsel, filed for an Arrangement under chapter 11 of the Bankruptcy Code in the Bankruptcy Court of the U.S. District Court of the Southern District of Ohio.

The cause of this bankruptcy had absolutely nothing to do with the operation of B&B Properties, Patchen Place apartment complex. The cause was involvement of Unit, Inc., in other enterprises of Unit and its subsidiaries.

Between 1975 when Unit applied to bankruptcy court and was appointed debtor in possession until June 1980, 5 years, Unit, Inc., through Mr. Morris operated as manager of Patchen Place without notifying the limited partners of it being in bankruptcy and continued to take money from the rentals, although prohibited by the partnership agreement.

Prior to June 1980, Mr. Unger had been negotiating on behalf of Unit, Inc., for the sale of all of Patchen Place with a Lexington, Ky., group known as Patchen Investment Group.

These negotiations were without the knowledge or participation of the limited partners who had invested the cash necessary to create the venture. These negotiations were consummated by Mr. Unger for Unit, Inc., in a land contract also without the limited partners' knowledge or participation.

The land contract was between Unit and the Patchen group, dated May 12, 1980. The land contract provided for the sale of Patchen Place, not just Unit's interest in Patchen Place but the whole job, the B&B partners' entire asset which would, upon sale, put the partnership out of business. Their property would be sold and the limited partners would have to take what they were offered.

This property was worth much more than the original investment due to appreciation. The land contract provided, "Approval Required. Purchaser recognizes that Unit, Inc.," I am quoting, "general partner and seller is a debtor in possession in a proceeding for a chapter 11 arrangement in the U.S. Bankruptcy Court for the Southern District of Ohio and that this sale contract is conditioned upon securing approval," and I mention that work emphatically. It was supposed to get approval of the U.S. Bankruptcy Court for the Southern District of Ohio, "and the limited partners of seller to all the terms and conditions thereof."

Senator SPECTER. Mr. Berger, may I interrupt you for just a moment. We have your full statement, and it would be most helpful to the committee—I have just consulted with the chairman—if you would come to the part of Mr. Unger's direct involvement.

There is a vast body of evidence and we have a great many witnesses, and if you would simply address Mr. Unger's involvement, it would be most helpful to the committee.

Senator HATCH. We also know quite a bit about that particular transaction. So please limit your remarks to Mr. Unger's involvement, and your criticism of his involvement.

Senator SPECTER. We will then have an opportunity to ask questions and draw out from you what we need to know.

Mr. BERGER. All right. I will do my best.

As I said, the partnership agreement or their own land contract said that they had to get approval from the limited partners before they could validate this sale. They did not do anything of the kind.

Senator HATCH. When you say "they did not," who do you mean?

Mr. BERGER. Unit, Inc., and Mr. Unger, their attorney, did not give notice to anybody about the deal and did not try to get approval from the limited partners of this deal.

Senator SPECTER. Mr. Berger, did that amount to more than a breach of contract?

Mr. BERGER. No; it amounted to due process of law. We were not given an opportunity to object to anything, to go in and say, "We are satisfied with this." It was all secret. It was all ex parte. Then he went into court, the bankruptcy court, and got an ex parte order.

Senator SPECTER. Well, if there were ex parte contacts, then I think that is what the committee would like to know about.

Mr. BERGER. That is right. The application to sell and the order that they got from Judge Gartner to go ahead with the sale were both ex parte. We had no input at all. We knew nothing about it until we got a notice from the judge, from the court that the sale was confirmed and would be confirmed absolute unless we came in and we objected to the sale in 5 days.

Senator SPECTER. At that point, did you object?

Mr. BERGER. We broke our necks, but we got to Cincinnati and stopped the sale on June 30, and our notice was given to us on the 23d, and June 30 was a Monday, and we had Saturday, Sunday, and Monday, and knocked ourselves to pieces to try to get there.

Then we met with Mr. Unger and we asked Mr. Unger about this and he gave us a very quick brushoff and we had to go to court.

Senator SPECTER. What did he say, as specifically as you can recall?

Mr. BERGER. The most I can remember is "This meeting is at an end." We tried to find out why he was doing this to us, and that is what we got.

Senator SPECTER. You say he said, "This meeting is at an end"?

Mr. BERGER. Yes.

Senator SPECTER. What had you said prior to the time he made that reply?

Mr. BERGER. Well, he would not let Mr. Morris, who was there, talk to us. His client was there, and he would not let him talk to us.

Senator SPECTER. Where was that meeting held and under what circumstances?

Mr. BERGER. In his office. We were able to get there on time to go to his office, and we waited in his office for him to get there.

Senator SPECTER. Was that the meeting that you had before you took this matter up with Judge Gartner?

Mr. BERGER. Before we went to Judge Gartner's courtroom.

Senator SPECTER. So you had a meeting set up with Mr. Unger and his client?

Mr. BERGER. Right.

Senator SPECTER. Who was there with you on your behalf?

Mr. BERGER. Mr. Hahalyak and one of the limited partners whose name I forget right now, one of our clients.

Senator SPECTER. What did you say to Mr. Unger, if anything?

Mr. BERGER. Who, the client?

Senator SPECTER. What did you say, or what did the client say?

Mr. BERGER. We said to Mr. Unger we wanted to know what this meeting—what had happened here? Why the sale was going to be made? And we went into his office, sat there for about 10 minutes, and we got nowhere, and he said, "This meeting is at an end."

Senator SPECTER. Well, before you say you got nowhere, it would be helpful if you would tell us what you said and what he said, as best you can recall. I know it has been a long time.

Mr. BERGER. My best recollection is a generality that we were trying to find out why they were doing what they were doing to the limited partners and find out more about it.

Senator SPECTER. Did you confront Mr. Unger on his actions in going to the judge ex parte?

Mr. BERGER. That is right.

Senator SPECTER. What did he say?

Mr. BERGER. I do not recall. I don't recall what he said at that point. All I knew was that we were being given a fast shuffle, and we came there to find out why. And we went to the court and we started to object to Judge Gartner's order that he had made, and we claimed that this order was ex parte. It was not made with any information from us.

Senator SPECTER. All right. You made the objection to the judge that it had been an ex parte order?

Mr. BERGER. That is right.

Senator SPECTER. Did Mr. Unger make any reply at that time?

Mr. BERGER. I do not know. I do not know whether he did at that time. It was quite an exciting meeting and a lot of people talking at the same time, because there was a lot of emotion involved at the time.

Senator SPECTER. Is there a transcript of that proceeding? Was there a court reporter present?

Mr. BERGER. Not at the beginning that I recall.

Senator SPECTER. Was there a court reporter after the beginning?

Mr. BERGER. Yes; Mr. Hahalyak says there was.

Senator SPECTER. Do you have the transcript available?

Senator HATCH. You are shaking your head, Mr. Hahalyak. Do you know where the transcript is?

Mr. HAHALYAK. There is a transcript, and when I present my side, I will go into the circumstances of that.

Senator HATCH. Do you have a copy of it?

Mr. HAHALYAK. Yes; I do.

Senator SPECTER. May we see the transcript, please? If we had the transcript, that would be the best evidence on what happened.

Senator HATCH. I agree.

Mr. BERGER. What happened at the time, the judge would not buy their idea about closing the deal right there. They wanted it finalized, and Mr. Burnett, a lawyer from Lexington who represented the so-called purchasers, was there and said he was going to withdraw the offer unless it was finalized right there and then. Judge Gartner refused to finalize it and said he would want to have some briefs, memoranda, and so forth, before he ruled on it.

Senator HATCH. Mr. Berger, what is the basis for your statement that Mr. Unger engaged in ex parte meetings?

Mr. BERGER. What is our basis for it?

Senator HATCH. Yes.

Mr. BERGER. The fact is that he knew and everybody else knew that there were limited partners. They had their names and addresses of everybody and we got no notice of it.

Senator HATCH. So the basis of your allegation that he engaged in ex parte meetings was because of the failure to notify the limited partners?

Mr. BERGER. That is right.

Senator HATCH. That is the only basis?

Mr. BERGER. During a 5-year period, we were not even told about the bankruptcy by anybody.

Senator HATCH. I understand. But that is your basis for making that statement?

Mr. BERGER. Yes.

Senator HATCH. Is there any other evidence or any other allegation you care to make about ex parte other than he failed to notify the limited partners?

Mr. BERGER. That is one thing, and the other thing is that the order of court telling us that if we did not get there within so many days which is 5 to 7 days and objected to this sale, that it would be deemed that the consent had been given.

Senator HATCH. So you are saying that the court order gave you 5 days, two of which were Saturday and Sunday?

Mr. BERGER. Right, and we had to come from Pittsburgh to Cincinnati and get our people together and decide what we were going to do here.

Senator HATCH. For the record, then, the basis for your statement that Mr. Unger engaged in ex parte conduct is, number one, he failed to notify the limited partners. That is your allegation.

Mr. BERGER. Right.

Senator HATCH. And number two, you got a copy of the order from the court indicating that you had approximately 5 days in which you could object if you wanted to or raise any other issues.

Mr. BERGER. Right. And the order itself, Mr. Chairman, could not possibly have been made by Judge Gartner to sell us out the way it was and get the information as a background for that order without having consulted us.

Senator HATCH. Now, if Mr. Hahalyak could come up. Do you agree with this basic account, Mr. Hahalyak?

Mr. HAHALYAK. I would like to clarify different points, and if I may, after he is concluded, Mr. Chairman.

Senator HATCH. Please remain where you are.

Mr. BERGER. I would like to go on, if I may, with the application of the proceeds of the sale as stated in Judge Gartner's order.

Senator HATCH. All right.

Please continue.

Mr. BERGER. The sale was for $5,300,000. There was a mortgage of $3,525,000 balance. There was something like $400,000 had already been paid in out of the rentals of the property. The property had appreciated considerably in value.

The cash at closing was to be given to B&B Properties, that is the name of the partnership, $1 million was to be given to them. Then $675,000 was also to be given to the partnership.

To the limited partners, $100,000 was to be the total distribution to the limited partners. That total amount of $100,000 was to be paid, of which Unit and Blum, Mr. Unger's client, was to get—he and Mr. Blum were to get $25,000 because they owned 25 percent of the limited partnership. They were to get $25,000 out of the

$100,000. And the people who put in $564,000 were to get the other $75,000 as their share of this whole transaction.

Now, this is what His Honor, Judge Gartner, had stated in the order was fair and reasonable.

Senator **Hatch**. Did you and Mr. Hahalyak and the other limited partners, contest that with Judge Gartner?

Mr. **Berger**. Did we contest that? Of course, we did.

Senator **Hatch**. OK.

Mr. **Berger**. Mr. Chairman, we came there—we had driven all night in a car because we could not get there in time otherwise. We missed our plane connection.

Senator **Hatch**. I understand that, Mr. Berger, but you contested it. What was the ultimate disposition by the court?

Mr. **Berger**. As far as I know, we contested the whole thing, not merely this. We had not analyzed it. We had not analyzed the figures at that time. But we knew that we were going to get nothing for the investment we had and that we were going to lose this whole 238 apartment complex which had grown in appreciation, and we were going to be on the outside and their 12.5 percent was selling us out. This is a case of the tail wagging the dog, and we were going to be left out in the cold when we made this for an investment and we expected it to last, according to the certification, for 50 years.

And we got there and we found ourselves on the outside looking in, and nobody had given us any opportunity to do a thing about it. So we went ahead and we filed a bunch of papers.

On Auqust 11, after filing papers and all kinds of memoranda and so forth for the court, on August 11, again, Mr. Unger came in with an application to Judge Gartner for leave to withdraw this proceeding of his which was to end up with this sale order.

That was ex parte. We were not consulted about that. Then he came in later on after filing that application and wanted the judge to permit him to withdraw. That was the first we knew about it when Judge Gartner called me on the phone and asked me whether I had any objections to it, and I did not know why it should not be done with prejudice. No, Mr. Unger would not do with this prejudice. He wanted it to be withdrawn, leave the door open.

Senator **Specter**. What did he want to withdraw at that point?

Mr. **Berger**. He wanted to withdraw the order or the proceedings on which he got this order to sell out this property, and the reason he gave and the reason is fact, because it happened that way, was that the people in Lexington who were the buyers had filed an action for specific performance based upon this same land contract.

Senator **Specter**. Mr. Berger, were you surprised when Judge Gartner called you ex parte?

Mr. **Berger**. Certainly I was.

Senator **Specter**. Did you say anything to him at that time about the ex parte nature of his call to you?

Mr. **Berger**. I said I did not understand why these proceedings were going on the way they were, and I wondered why. Now, whether I said, "I'm surprised at the ex parte at that moment", I cannot honestly say. It was a telephone conversation, and I was interested in the substance rather than in the form at that particular time, although I know it was that way.

Senator SPECTER. Mr. Berger, I understand the difficulty of a lawyer saying to a judge, "You are doing something wrong, Judge," or raising a question about the judge's conduct. But my question to you is, did you question the judge concerning the propriety of the judge's initiating a call to you without Mr. Unger being a party to it?

Mr. BERGER. Senator, I am very sorry I cannot honestly say that was the case. I was irate at the whole situation, and I was not trying to insult the judge or to say anything to him that was detrimental because, after all, he did call me.

Senator SPECTER. Well, one of the things we are trying to find out in this hearing is what the judge's practices were. There has been a contention made here that it was common practice in that district for ex parte communications to occur on matters which were of an administrative or a noncontested line, and one of the things of concern to this committee is what those practices were.

So when you testify the judge called you, that has certain probative value for what we are trying to find out, and that is why I am inquiring as to what conversations you had with Judge Gartner.

Mr. BERGER. Well, we know how it affected us. We know that it was ex parte as far as we are concerned. On top of everything else, we were living in Pennsylvania. Some of our people were not even in the United States. I am talking about the limited partners, and they did not get any input at all. They had no right to participate.

Senator SPECTER. There were very substantial sums of money involved here?

Mr. BERGER. Substantial, certainly.

Senator SPECTOR. How much money was involved?

Mr. BERGER. $564,000, of which we were going to get back $75,000, and they were going to get the advantage of a note which Mr. Morris, as general partner, had given to himself as contractor, and it was for $800,000 which was supposed to be due in 2021 A.D. And on account of what was going to result in a dissolution that note that he got or gave to himself was going to be matured and cash was to be paid on it when it was a note without interest.

And the whole thing was beautifully planned, planned in such a way that all the money that would come in to B&B Properties as it shows in the order would go to the people who were running the show and nothing to us to speak of.

Senator SPECTER. Mr. Berger did you stop that transaction from going forward?

Mr. BERGER. We stopped it because we were not going to go ahead with it. We were going to wait——

Senator SPECTER. Judge Gartner ruled in your favor on your application?

Mr. BERGER. Did we what, sir?

Senator SPECTER. Did Judge Gartner then rule in your favor?

Mr. BERGER. Judge Gartner had not gotten that far when they came along and withdrew.

Senator SPECTER. All right. So it was withdrawn.

Mr. BERGER. But he did say that it did not look right in one of the orders here.

Senator SPECTER. But the efforts that you say Mr. Unger was trying to accomplish were unsuccessful because of a withdrawal?

Mr. Berger. The stoppage was in that respect that he withdrew because I think he saw that it was going against him so he let the other people start this specific performance action which is still pending in Kentucky.

Senator Specter. Now, the complaints that you have about Mr. Unger for the committee today relate to your allegations about his ex parte communications with the judge, is that correct?

Mr. Berger. Not altogether. In trying to force through a deal like this one which would be an outrage and an absolute plunder.

Senator Specter. Well, aside from the ex parte communications which you allege, do you think that the balance of his conduct amounts to unethical conduct?

Mr. Berger. Yes, I certainly do.

Senator Specter. Will you tell us why?

Mr. Berger. I will say this that when you have the law that says that a limited partner, a general partner of a limited partnership, has no right under the Uniform Limited Partnership Act which is almost current in every State, that such a general partner does not have the right without the written consent of all the limited partners to do any act which would make it impossible for the partnership to continue to be in business, and when a person with the knowledge of Mr. Unger, and I respect him for having legal knowledge, knowing that law would try to force through, get an order of court to sell out this partnership which would sell out the partnership property which would make it impossible for the partnership to exist any further and not get the written consent of all the members to the specific act as provided in the law of Kentucky under which this was organized, I say there is something wrong there.

Senator Specter. My question to you is, is that more than a breach of contract on the part of Mr. Unger's clients?

Mr. Berger. I think it is for the reasons I have given.

Senator Specter. Is it a conversion? Does it constitute a crime?

Mr. Berger. I beg your pardon.

Senator Specter. Is it a fraudulent conversion? Does it state a crime?

Mr. Berger. I will not pass on that. I will simply say that in my opinion as a lawyer, it is unethical for having done what was tried to be done here and we are still being given a runaround by the people on the other side for 3 years, and we have reams of paper, including proceedings that are constantly started here and started there.

Senator Hatch. Mr. Berger, is this matter still in litigation?

Mr. Berger. Yes, sir.

Senator Hatch. So this has not been resolved?

Mr. Berger. It still has not.

Senator Hatch. Does it still need to be resolved?

Mr. Berger. Well, I would like to bring that to your attention since you have asked. They went ahead with the land contract, that is, the other people. Unit joined them as a party against his own limited partners. We had a decision from the court in Kentucky, the Fayatte Circuit Court in Kentucky, we had a decision where the judge turned down their claim for specific performance but not on the basis of the ULPA, on the basis that the land contract itself had not been fulfilled, because they never got the consent they were supposed to get.

The people against us then went to the court——

Senator **Hatch**. Let me interrupt. We do not want to get into that whole case, Mr. Berger.

Mr. **Berger**. All right.

Senator **Hatch**. I think you have stated your allegations, and I think we understand them from your standpoint. I would like to turn to Mr. Hahalyak now and hear what he has to say about it.

TESTIMONY OF MICHAEL HAHALYAK, ATTORNEY, PITTSBURGH, PA.

Mr. **Hahalyak**. Mr. Chairman, I would like to state that I am here with reluctance, but I feel I owe a duty, and I have come here because of that duty, and that duty compels me to state to you that Mr. Unger has performed, in my opinion, in the matters that I have been subject to with him, in a most unethical manner.

He has violated the processes of the law beyond any one that I have ever seen in a courtroom. He has distorted the facts willfully. He has misapplied the law maliciously. He has performed acts that clearly mean this man should not be on the bench, and if he is, this is your responsibility.

Senator **Hatch**. Give us your complaints about Mr. Unger.

Mr. **Hahalyak**. Let me come to the specific facts so that you have every detail that I could possibly give you within this very short period of time.

Senator **Hatch**. First, Mr. Hahalyak, let me get one question answered. What is the total combined investment of your law firm? Mr. Berger, and youself? $75,000? Of the $500,000 sum?

Mr. **Berger**. $75,500.

Senator **Hatch**. How much was your law firm's and how much of it was Mr. Hahalyak's?

Mr. **Berger**. Mr. Hahalyak two-thirds and one-third our law firm.

Senator **Hatch**. So you had approximately $47,000 in it?

Mr. **Hahalyak**. Yes.

Senator **Hatch**. And your law firm had approximately $25,000?

Mr. **Berger**. That is right.

Mr. **Hahalyak**. I am speaking not as an investor. I am speaking as the attorney, Mr. Chairman, and I am looking at it from the standpoint of the law as to whether this man is qualified for the position that is sought to be given him.

Let me say that I got into this picture back in 1980. I was in the limited partnership in 1972, and at the time that I was in the partnership, it was represented to the partners by Mr. Unger's client, Mr. Morris, that this limited partnership was a long-term investment. This is very important from the standpoint of veracity and whether or not you will invest, because if this——

Senator **Hatch**. Mr. Hahalyak, we understand all of that. We do not need the whole case. We just need to know what your charges are against Mr. Unger.

Mr. **Hahalyak**. Mr. Unger's client, Mr. Morris, represented by Mr. Unger at that time, had gone into bankruptcy under chapter

11. In the bankruptcy proceeding, in papers I have before me, commenced apparently on September 26, 1975, it shows that Sherman Unger was representing Mr. Morris or Unit, Inc. The record shows that he was the attorney for Unit, Inc. His address given at that time is 2918 Observatory Place. This was the address, really, as I recall, of Unit, Inc.

I see here that the attorney for the petitioning creditors, the other side, is Mr. Michael Kohn. When I went there to Ohio in 1980, Mr. Kohn and Mr. Unger were associated together. We therefore have a conflict of interest as reflected on the first page of the bankruptcy record.

We have Sherman Unger representing the bankrupt and we see his associate, at least his associate in 1980—I am not sure if he was at that time—Michael Kohn representing the creditors.

The address given by Mr. Kohn is Dubois Tower. At the time I went to see Mr. Sherman Unger, his office was in Dubois Tower.

Now, when you have that bankruptcy proceeding and Mr. Unger was representing Unit, Inc., and Mr. Morris, Mr. Unger was fully aware of the fact, and I am relating now to Patchen Place, when he sought to force the sale of this property, he was fully aware of the fact that there was a conflict of interest, and any attorney with any ethics would have withdrawn from that case immediately. He did not. He pursued it to the point where he sought to force the sale of Patchen Place that was under the law improper and should never have been done and cannot be done legally and will never be done legally although they have songht to do it and have done it in such a manner that they have violated the provisions of the law.

Senator SPECTER. Where was the conflict of interest precisely?

Mr. HAHALYAK. The conflict of interest would be this. The partnership, Mr. Morris, and Unit, Inc., was the general manager and general partner of Unit, Inc. Unit, Inc., owed a duty to the limited partners. This was a fiduciary duty. This was a fiduciary duty that was a strict one under the law and Unit, Inc., could not break that duty.

On the other hand, when M. Unger represented Unit, Inc., which went into bankruptcy under chapter 11, the duty there under bankruptcy would be to the creditors of Unit, Inc. In other words, it is impossible to serve two masters here—Unit, Inc., in bankruptcy and Patchen Place as general partner—because their interests are totally adverse and different.

Senator SPECTER. So he represented the general partner——

Mr. HAHALYAK. So he represented the general partner, pursued the matter for the general partner, went into court with an arbitrary order without any notice, and I will come to it so you can see the specifics of this and see precisely what this man did. And sought to steal, in effect, this property.

Now, let me point out why I say what I say. First, he had gone on June 19, 1980, to the court on his own application and this is not by way of the practice in that area. He had to do this on his own. He filed an application on his own and he averred certain facts in that application for the sale of this entire property mind you, the entire property, in which Unit, Inc., had only a small interest.

He went in there to sell Patchen Place belonging to people that were in no way involved in this bankruptcy proceeding. He knew that was improper or he did not understand the law at all on the elementaries. But he knew that.

Nevertheless, he proceeded. And how did he proceed? He filed an application setting forth self-serving facts that were false in many respects, knowingly false. He presented this petition to the court, to Judge Gartner, apparently on June 9, never giving notice to the limited partners whose property was being taken. Imagine, this property was being sold without notice to the people who invested their money and were represented to be protected on a long-term investment.

He went in there before Gartner without notice to the limited partners and apparently had an order signed, and he then subsequently notified us of this particular application and of the order. Both the application and the order were without any prior notice to the limited partners. Absolutely unbelievable.

Senator SPECTER. You say you got the notice, though, after the order was signed?

Mr. HAHALYAK. No, we got the notice after the order was signed, in which there was supposedly a hearing, and there was no hearing.

Senator SPECTER. Why do you say there was supposedly a hearing?

Mr. HAHALYAK. Because in the order, it says, "after hearing," in the order itself, and one would be led to believe that there was a full hearing on the matter. There was not. The person who testified was Mr. Unger. It included some self-serving statements that were false, and I will go into the falsity of his statement.

We received notice of this for the first time, never before, on June 25. The objections to the alleged hearing, if there were to be objections, would have to be filed before the 30th. Now, mind you, it was not a case where there would be a hearing on this. It was a case that if you did not object, this order would be final, and you better not object, the order said, because it is absurd for you to object.

If you read that order, that is what Sherman Unger put into that order, and the court routinely signed it.

We got this notice on June 25. It was dated June 19, and this is what the letter said:

> As Unit, Inc., is a debtor in possession in proceedings under chapter 11 of the Bankruptcy Act, it was necessary to first secure the permission of the United States Bankruptcy Court, Southern District of Ohio, Western Division. Such approval has been sought and on June 19, 1980, the court's approval was secured.

No notice. No due process. Ex parte. Sherman Unger himself.

"The court has concluded that the contract of sale is a good one." Imagine that. The court finding that this sale is good. It destroyed the very interest of the people that had invested their money. It is a conclusion that is untenable, that is absurd and shows a fraudulent act.

"The court has concluded that the contract of sale is a good one and directed Unit to proceed with its consummation." These are the words of Sherman Unger. These are not the words of the court. These are the words given by Sherman Unger to the court.

Next this letter states, "The court, like the purchaser, is aware that your approval is required before the closing may occur. However, the court also recognized"—before I come to that.

"The court, like the purchaser, is aware that your approval is required before the closing may occur." This is a proposal of law that there could be no question about. And yet do you know he refused to get the permission of the court? Do you know that at no time until the present time there has never been permission of the court? And do you know that through his associate, there has been a sale of Patchen Place despite the orders of the court suspending the matter and despite the fact that they recognized what the law is?

There has never been a court order of this particular sale yet there has been a conveyance. Total disregard of the law.

It goes on to say: "However, the court also recognized that consummation of this sale would be most important to Unit's creditors." Here is your conflict of interest. How could you represent both?

The court says: "However, the court also recognized that"——

Senator SPECTER. Does the court ask how one could represent both?

Mr. HAHALYAK. I am saying here is where your conflict arises. They are saying here is our property. This order is being made, and the court is speaking properly in terms of the creditors and saying:

> The court also recognized that consummation of this sale would be most important to Unit's creditors. Because it was unable to foresee any reasonable objection to the sale, the court has directed that any limited partner who seeks to withhold consent, notify the court and Unit in writing prior to June 30, 1980, at the addresses set before.

Believe it or not, this is incredible. It states that: "Because it was unable to foresee any reasonable objection to this sale, the court has directed that any limited partner who seeks to withhold consent notify the court and Unit in writing prior to June 30, 1980." This is incredible.

They were taking away the property of the limited partners without any notice to them and telling them that this was for their benefit. There would have been a recapture far in excess of any gain or benefit that they had.

This was confiscation of property without even due notice, and this man knew precisely what was taking place. The reason why he did it is because he represented Morris who had allegedly a claim for $800,000, and this was an overrun they claim which we denied was a proper claim, but in order to get that, the partnership agreement said the property had to be sold.

So in order to get that $800,000, he was finding ways to get this through without anybody knowing about it, and it was only at the last minute when we got this on June 25 that within 5 days, mind you, we had to assemble ourselves, and get out there, and get out there in a hurry, and it was really a most difficult task, but we had to get there and we did get there and we raised objections.

Senator HATCH. Do you agree with Mr. Berger that this matter is still in litigation?

Mr. HAHALYAK. Let me say this. Their disregard for the law is so great that although it is in litigation, they, on their own, secretly, made a conveyance of this property, Patchen Place, to this group, the same purchasing group—Morris made this conveyance to the same group disregarding every phase of the law, secretly, without our knowledge.

Senator SPECTER. Without court approval?

Mr. HAHALYAK. Without court approval, without our notice, without our knowledge.

Senator SPECTER. Is that conveyance valid?

Mr. HAHALYAK. In my opinion, the conveyance is not valid. I do not think that conveyance is worth a penny. In the interrogation of the attorney who represented the buyers, I asked him, "Did any title company insure this?" He said, "No." I said, "Who did the title search?" He said he did, and he is, in my opinion, in joint conspiracy with Mr. Unger's group in this conveyance, an absolute conspiracy.

If you want to see a similar case in which the court reprimanded counsel for it and in which there had been liability on the part of the attorney and particularly because of breach of fiduciary duty, read the *Newberger* case. We will give you the citation. It is very close. Almost parallel on the facts.

Now, this letter states: "Unit believes that this sale is clearly in the best interest of the partners." How can any human being make that statement? How could you have a greater confiscation of property than this and a misrepresentation of the facts?

This was devised by Mr. Unger. This is his own penmanship taken over from the order that he had prepared. "Your cooperation and consent is therefore requested."

They then have their signature with the U.S. Bankruptcy Court below it as though the court was issuing this letter, and I want you to get this letter because one would have, if he were a layman, suspected that this came from the court, that this court feels that you should not object, and really what he did is mislead.

Senator HATCH. Have you provided the letter to the committee?

Mr. HAHALYAK. No, I have not.

Senator HATCH. Without objection, we will put that in the record at this point. You make sure this reporter gets the letter.

[Aforementioned letter follows:]

1055 St. Paul Place,
Cincinnati, Ohio 45202
(513) 579-0313

JUN 25 1980

2.

[illegible] Mike Hays - Unit Pres

6.2% [illegible]

- [illegible]

from [illegible]

8,333   4.7M

50% limited says suff[illegible] should have written

19th June, 1980

TO: LIMITED PARTNERS OF B & B PROPERTIES

Dear Sirs,

B & B Properties has entered into a contract for the sale of Patchen Place Apartments, the land upon which the apartment complex is located, and the furnishings, equipment, etc. utilized in connection with the operation of the complex. The purchaser is Patchen Investment Group, a Kentucky general partnership. The purchase price is $5,300,000. The terms and conditions of the sale are set forth in the Court Order, a copy of which is attached to this letter.

As Unit, Inc. is a debtor-in-possession in proceedings under Chapter 11 of the Bankruptcy Act, it was necessary to first secure the permission of the United States Bankruptcy Court, Southern District of Ohio, Western Division. Such approval has been sought and, on June 19, 1980 the Court's approval was secured. The Court has concluded that the contract of sale is a good one and directed Unit to proceed with its consummation.

false

false a clear [illegible]

The Court, like the purchaser, is aware that your approval is required before the closing may occur. However, the Court also recognized that consummation of the sale would be most important to Unit's creditors. Because it was unable to foresee any reasonable objection to the sale, the Court has directed that any Limited Partner who seeks to withhold consent notify the Court and Unit in writing prior to June 30, 1980, at the addresses set forth below.

Unit believes that this sale is clearly ~~in~~ the best interests of the partnership. Your cooperation and consent is, therefore, requested.

Sincerely,
UNIT, INC.

B.W. Morris

?→ U.S. Bankruptcy Court,
Southern District of Ohio,
Western Division,
735 U.S. Post Office & Courthouse,
Cincinnati, Ohio 45202.
Attention: Hon. Leonard C. Gartner

Unit, Inc.,
1055 St. Paul Place,
Cincinnati, Ohio 45202.

Mr. **Hahalyak.** This is the letter that was prepared by Mr. Morris, and in my opinion, of course, it was prepared by his counsel. A copy of the order was sent, and in it we see the disbursements that are to be made from this sum of money.

Instead of the money going to the owner of the property, B&B Properties, we see Mr. Unger making allocations to those that he wants to get this money, and in particular, Mr. Morris, his client, and in particular this $800,000, the overrun, to which he was not entitled unless the property was sold, and it was even our position the $800,000 was not accurate nor proper nor valid.

We had no opportunity to go into the amount of $800,000. It was our position that it was not owing. No fairness, no due process, nothing of the kind. It was really a taking of property without due process.

We see a disbursement here and we see Mr. Morris getting this money. Incidentally, that $800,000 was payable in the year 2001 or whenever the partnership would end. It was without interest. If you take $800,000 without interest and take the present value of it, I do not think the present value is over $50,000. What they did is they got $800,000 when the present value is $50,000 or less.

Now, in the order we see the language that is totally misleading. "From the debtors application in this hearing," this hearing mind you, the term hearing being used, imagine nobody present that had an interest worthy of protection was even notified, and in his order, he calls it a hearing. If your honor can see a hearing in this, I would state that it certainly would be the most unreasonable hearing that was ever developed.

"From debtors application in this hearing, this court has determined that the sale of the real estate in accordance with the terms of the land contract is fair and reasonable." Unbelievable. "The sale is in the best interest of Unit and its creditors," unbelievable, "as it will permit Unit to receive a substantial amount of cash." This is believable. This is the only part that is accurate, that Unit, Inc., his client, would receive a substantial amount of cash.

And they go on to say, "* * * and will allow Unit to receive additional moneys" and so on. "In addition," it states, "this court has determined that this sale is in the best interest of B&B Properties." This is almost an insane statement. This is incredible. It has no basis in fact. It has no merit whatsoever, and yet by this statement, any layman who was a member of the limited partnership would assume, if the court made this statement, it must be honest. It was as false as could be. And whoever made that statement sought to mislead, and he did mislead and he intended to mislead.

"Therefore," the court says, "absent the most extraordinary reasons, it would be unreasonable for any limited partner of B&B Properties to withhold consent." Could you see anything more ridiculous than that, more arbitrary, more false, more misleading?

In other words, the court put out, although there had been nobody present at the hearing and they call it a hearing, the court, through Mr. Unger, has the audacity to state, "Therefore, absent the most extraordinary reasons, it would be unreasonable for any limited partner of B&B Properties to withhold consent for this sale."

This would destroy the interest of the limited partners, absolutely confiscate everything they had. You could not ask for a more confiscatory type of approach, more arbitrary type of approach, more unreasonable approach, and yet to the layman, to the people that had an interest, it made them believe that absent the most extraordinary reason you better not come in and object. Incredible.

It then goes on to state that the debtors application for authorization and so on is sustained, and because this sale is of such importance to Unit rehabilitation, Unit is directed to proceed with the sale in accordance with the terms of the land contract. "* * * because this sale is of such importance to Unit's rehabilitation." But what happened to Patchen Place? Patchen had no right to be before the court. Patchen was not the property of Unit, Inc. Patchen was the property of B&B. B&B was not in liquidation.

Why this was there before the court, I will never understand. It should never have been there, and it should never have been for a more important reason that Mr. Unger well knows, and that is that Unit, Inc., when it went into bankruptcy owed a duty to immediately resign from the position as general partner of B&B because of the conflict of interest.

Senator HATCH. I think we understand the point from both of your testimonies.

Mr. HAHALYAK. I tell you there is a thousand points here. It will be one ex parte after another.

Senator HATCH. We will be happy to keep the record open. Let me just ask Mr. Unger one thing.

Mr. Unger, did you represent Unit, Inc., at this time or Mr. Morris? Were you his attorney?

Mr. UNGER. At which time, Senator?

Senator HATCH. At the time that they are describing here.

Mr. UNGER. I did not represent him or even know Mr. Morris in 1971. I am prepared to respond to all of their ex parte charges. I am not prepared to debate their concept of litigation.

Mr. HAHALYAK. We said 1975, Your Honor.

Mr. BERGER. We did not say 1971.

Mr. UNGER. Well, if you read your affidavit, Counsel, you will see you said I represented him in 1971.

Mr. BERGER. No, we did not say that.

Mr. UNGER. Read your affidavit.

Senator HATCH. We will give you a chance to respond, Mr. Unger. At this time we will be happy to take any documents you care to submit for the record, but I think I fully understand what your complaints are.

Mr. HAHALYAK. I would like to answer Mr. Unger if he has any replies, because I think it is relevant.

Senator HATCH. We are giving you the chance to tell your side. Mr. Unger is going to be the last witness here today, and he is going to have a chance to tell his side. I will end the hearing at that point.

Mr. BERGER. Mr. Chairman, I think we left open one question that you asked, and I think you are entitled to know. While this case was pending in the circuit court for Fayette County in Kentucky and after we got a decision from the court, the other people, through Mr. Burnett, ask for the court to reconsider his opinion, and while the court was reconsidering that, these parties got together and alienated a bunch of our limited partners, got them to sell shares, their shares, and then they went into the bankruptcy court and filed an application to sell Unit's interest in the partnership property and got an order to that effect.

Senator **Hatch**. Are you claiming that Mr. Unger did all this?

Mr. **Berger**. No, I am not claiming that. I am merely bringing you up to date that as a result of that, there was a sale made and a deed put on record, and this is where I wanted to bring you up to date, sir.

As a result of them bringing this into, filing this deed on record in Kentucky, we then went into the Federal court, U.S. District Court of Eastern Kentucky, and filed a complaint asking the court to set aside this deed because we claim this deed is a nullity.

That was what was left open. I wanted you to know that.

Mr. **Hahalyak**. Let me say, Mr. Chairman, they had filed a withdrawal of their petition of sale pending before the bankruptcy court wherein they averred that in their own contract court approval was a necessity to the proper validity of the sale.

They withdrew that and went into another court—circuit court of Kentucky—and the history indicates they moved from one court to another to outmaneuver whoever they could by a bunch of pleadings that they knew would harass the particular persons, and I tell you there were many, and I would like to go into detail but we do not have the time, but I want you to know that the evidence is here and I am willing to present it at any time. It has been a harassing situation.

Senator **Specter**. Mr. Hahalyak, I think the committee would be interested in whatever contentions you have as to the harassment. Perhaps you could submit that to us in writing—on the multiplicity of suits.

I have a couple of questions for you from the transcript, if I may. I had asked the question earlier as to whether you had made an objection about the ex parte communication.

Mr. **Hahalyak**. Very much so. We hurriedly went to the hearing that was scheduled before the 30th.

Senator **Specter**. Mr. Chairman, I suggest that this transcript be made a part of the record.

Senator **Hatch**. Without objection.

[Transcript follows:]

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

IN THE MATTER OF: :
:: Bankruptcy No. B-1-75-1989
: ORAL ARGUMENT ON MOTION TO STRIKE (RE: OBJECTIONS
UNIT, INC. : OF B & B PROPERTIES)
:

The above entitled cause came on for hearing before the Honorable Leonard C. Gartner, Bankruptcy Judge, United States District Court, Room 725, United States Post Office and Courthouse, Cincinnati, Hamilton County, Ohio, on Thursday, July 17, 1980 at 2:00 p.m.

APPEARANCES

FOR DEBTOR:

✓ Sherman Unger, Esq.
2820 DuBois Tower
Cincinnati, Ohio 45202

Patricia Kindle, Esq.
2920 DuBois Tower
Cincinnati, Ohio 45202

FOR LIMITED PARTNERS:

Morris Berger, Esq.
Berger, Kapetan, Malakoff & Meyers
508 Law and Finance Building
Pittsburgh, Pa. 15219

Michael Hahalyak, Esq.
2001 Clark Building
717 Liberty Ave.
Pittsburgh, Pa. 15222

FOR PURCHASER:

✓ Thomas H. Burnett, Esq.
259 W. Short St
Lexington, Ky. 40507

THE COURT: Somebody usurped the Court's file. I probably won't need it because I think I know why we're here.

Do you want to proceed, Mr. Unger?

MR. UNGER: Yes, Your Honor.

I would, on a preliminary matter, like to put into the record that counsel purporting to represent the limited partners are now in court for the second time and have filed petitions, motions, et cetera, and I note that we have had to file two motions to strike because they didn't comply with the local rules, and would like to call attention, their attention and the Court's attention to their failure to comply with Local Rule 3.0.1 which does require local counsel with an office admitted to this district and with an office in this district when one appears in the Federal Courts. And it might, if we are to continue this matter at all, facilitate us to have local counsel which understand the local rules. And I suppose I would reserve any other comment on that and I'm prepared to go forward now, but at this time do we have local counsel if we are to proceed at all.

We have filed and have before the Court today a motion to strike the letters and alleged objections by the limited partners in B & B to the application and order by this Court authorizing Unit, Inc. to proceed to sell B & B Properties. That initial application and the order found that the sale was fair, that it was reasonable, and that it was material to Unit's rehabilitation. The purpose of the application is that Unit is before the Court on a Chapter 11 and if it is to sell part of its assets it most properly needs Court approval, and we ask for that Court approval.

The limited partners have pointed out to this Court that B & B is not before the Court. They question the jurisdiction of the Court. They say they're not properly before the Court, that B & B is not properly before the Court.

The only real issue we have today is, is this proper sale for Unit from its assets that a fair price in order to facilitate its reorganization. I recognize today, though I didn't when the sale was being negotiated, that there are some disagreements among the partners. However, I think that if they are to be resolved in litigation, they should be resolved in litigation in another form or maybe B & B should be before the Court. But it's clear to me that these limited partners have no standing, because the partnership agreement clearly spells out that those partners whose consent may not be unreasonablely withheld are only those limited partners that are liable for losses.

Now, we have nowhere before this Court any argument, any suggestion, any evidence that any limited partner is liable for losses. Failing to establish the initial requirement we find they cannot even get to whether they are reasonably withholding their consent, because they don't have a consent. But let's assume for a moment that they had a right to vote. Nowhere in these files, in these pleadings, in these arguments, in these letters and telegrams, do I find a reasonable grounds not to consent. So withholding is in fact unreasonable.

However, concentrating on what I considered to be the narrow ground that brings us into this courtroom at this time, the price is fair. Unit is in a reorganization. Unit has a substantial amount of its assets tied up in a non-interest-bearing loan. They have loaned the money to the partnership. And if that is so, if the Court feels that it is a proper transaction as far as fair exchange, I submit that this Court should authorize Unit to sell. Now, if there is a problem between any of the limited partners and Unit concerning any partnership interpretation or partnership matter, that needs to be resolved in a different form. The only test today is, is this a fair exchange for Unit, Inc. who is in a Chapter 11 trying to reorganize and get out of this court.

THE COURT: But if we authorize the sale, I understand your position, that's the very asset upon which the partners perhaps do not want to go along and that could be the partnership problem, couldn't it?

How do you solve that after the assets are gone?

MR. UNGER: I think, Judge, that if it's a fair sale for Unit and this Court says, as far as the Chapter 11 proceeding is concerned, it's okay, I don't have much doubt that we will find another form very quickly. If they don't, I will.

THE COURT: I don't know what you're talking about. What are you saying here, Mr. Unger?

Mr. UNGER: It's a Kentucky partnership. I'll probably file for the declaratory judgment in Kentucky, if I can hold the buyers long enough. The only reason I'm here, Judge, is I need your approval so that we can go forward. If they have unreasonably withheld their consent, or if they don't have the right to consent or if they no longer have a right to vote because they are no longer liable for losses, which I submit is the case, --

THE COURT: That's the reason I thought you were here this afternoon, was to try to explain or demonstrate to this Court that these partners have no standing even to object to this authorization to sell.

MR. UNGER: I did; I tried to.

THE COURT: That's what I want you to devote your time to.

MR. UNGER: Now, I call the Court --

THE COURT: Under what theory do you propose such a legal proposition?

MR. UNGER: I call the Court's attention to the partnership agreement itself.

THE COURT: I don't know whether that's been formally introduced in evidence or not. There is a copy of the partnership agreement attached to a pleading which I read.

MR. UNGER: I think we can all stipulate that -- I can introduce it into evidence. I'll call Mr. Morris and he'll say this is the partnership agreement and I'll --

THE COURT: Just so we agree that we're looking at the -- where is that partnership agreement? I just want to be sure we're all looking at the same document and reading the same words, that's all.

Do you mind just passing that down there so they can look at it and we'll agree we're looking at the same thing. That's all, I just want to be sure we're all talking about the same document.

MR. BERGER: May I please, Your Honor? If this is a case where we introduce evidence, then we should be able to present all the evidence, not just a document. There is a lot of other evidence.

THE COURT: That's all right. You will.

MR. BERGER: I know. But at this particular time we were only called for argument and we were not called to bring --

THE COURT: I don't know how we can argue the point he's trying to argue unless we have the partnership, what we all agree is the partnership document upon which his argument is based.

MR. BERGER: I agree, sir, but I say that this is a hearing to take testimony. When exhibits can come in, then we'll bring in all of our exhibits too and show -- because just to take an isolated document and argue from that without having any further proof --

THE COURT: That's the reason I'm passing it around, to be sure we all agree this is the document. Mr. Unger's arguments, as I understand it, are based on this document.

MR. UNGER: Yes, Your Honor.

THE COURT: And legally -- no testimony required. It's just a legal interpretation of the document.

MR. UNGER: As I understand, Your Honor, the Court asked for the partnership agreement the last time we were all assembled and I believe one was filed and we all agree it's the same agreement.

MR. HAHALYAK: On the basis that this is an oral argument, we have no objection, Your Honor. The partnership agreement is in the file there --

THE COURT: Yes, that's what I'm saying, so we can use it from the standpoint of --

MR. BERGER: For the sake of argument.

MR. HAHALYAK: Yes, for the purpose of oral argument only.

THE COURT: All right. Uh-huh. All right, Mr. Unger.

MR. UNGER: I'm waiting for Mr. Berger to sit down.

MR. BERGER: Go ahead.

MR. UNGER: At the top of page 10 of the partnership agreement, the partnership agreement specifically says that the liability of the special limited partner, and the limited partners, for losses of the partnership shall be limited to the capital contributions made by the limited partners. The provision in the partnership that refers to a sale of an asset more than $100,000 is found at the top of page 15 of the partnership agreement.

THE COURT: All right.

MR. UNGER: It specifically says and it clearly says, "Without the written consent of the limited partners liable for 50 percent of the losses of the partnership, which consent will not be unreasonable withheld, the general partner shall not do so himself. If there are no limited partners liable for losses, no limited partner may vote." Now, there had to be a reason that they were putting this in and they were protecting themselves. And I submit that the reason was they wanted to vote while they had their capital contributions up. But they wanted to be very certain that their risk was limited. And they were so certain that their risk was limited that they limited their right to consent.

Now, this is an agreement, a lot of the limited partners are lawyers; I feel confident that it was drafted -- I see it was drafted in Pittsburgh by Mr. Engels' firm -- I believe the Court remembers

Mr. Engels in another matter -- I feel confident that the agreement was reviewed and reviewed and the plain language of the agreement says that they may not vote unless they are liable for losses. There is no limited partner liable for losses today. We have attached to our motion to strike the affidavit of Michael Mays specifically setting out the fact that the capital contribution of the limited partners has long ago been lost. There is no other liability present that the limited partners have. Having lost their capital contribution they have no right to vote. Having no right to vote, they have no standing. Having no standing, I think we should go forward with Unit's application for permission to sell. If they can find a form in which they do have standing, we are prepared to litigate it.

I submit that they do not have a standing. I have a ready buyer with a half million dollars in cash sitting in a bank about to walk, I think I've been in this position before, and I'm trying to move forward because in my opinion, and I can present testimony and I'm prepared to today if the Court desires, it's a very fair and reasonable price for this piece of property. The property is just about breaking even.

THE COURT: Well, to summarize at least your argument up to now, you would give the Court the impression that Unit, Inc. is totally unrestrained insofar as handling B & B Properties at this point.

MR. UNGER: I would give that impression, yes.

THE COURT: In other words, there's no check on what it does whatsoever, by anybody.

MR. UNGER: Sure, sure. They have a fiduciary responsibility, but there is no vote on sale. Sure, they're a general partner, they have every obligation that a general partner has under the partnership law, under the partnership law specifically of Kentucky, they have fiduciary obligations, they must get a fair price, they must manage reasonably, and they must make reports, they must keep records. There are a lot of restraints.

THE COURT: But according to you there is no restraint on their capacity to sell this property?

MR. UNGER: Under this agreement.

THE COURT: On their own power, as the general partner.

MR. UNGER: That is correct.

The only restraint that I know of is, Your Honor, because Unit's in a Chapter 11. There is no right of the limited partners to vote because there is no liability of the limited partners. Not having the right to vote, they can't withhold consent because they have no right to consent. They have no right to consent, they are not properly before the Court, they have no standing on this particular issue.

I submit that it's clear. I also submit, Your Honor, that it's the absolute only thing those words can mean. Why else do they have that limitation in there?

THE COURT: It's a very unusual provision in a partnership, I would think, but that's not for me to say.

MR. UNGER: Nor me. But why are they there? And they're there repeatedly, it's not just this one time. They're there ten times.

THE COURT: What's that? What do you mean?

MR. UNGER: Different votes that the limited partners have depending on those partners liable for 66 percent of the losses, those partners liable for 50 percent of the losses, they keep using the word "those limited partners liable for losses." Now, the only thing that can mean is those partners liable for losses. Now, I submit that we could have a situation, and before the Court yesterday we had a matter where there was a partnership that was refinanced and the new limited partners brought in. Those new limited partners until their capital contribution was used up, or lost, would have voting rights under this partnership agreement. The original limited partners, when they've made their capital contribution, had voting rights. So that money's been lost. And this provision specifically says they can only vote when they are liable for losses. It's the clear meaning of the words. It's unusual, I agree, but those are the words. This is the agreement.

I can't find a case like it because I've never seen anything quite like it. But I've read it and reread it and that's what it says. And I submit, Your Honor, that based upon that they have no standing. Having no standing, we should go forward with approval. If the limited partners disagree, there are lots of courts all over the country that can try to do something if they wish. But I don't think they have any standing anywhere. But for the moment we're only interested in, is this a fair exchange for Unit who is in a Chapter 11 before this Court.

Thank you.

THE COURT: Yes.

MR. BERGER: May it please Your Honor, this is the first time in my 51 years of practice that

I've ever heard where Unit, where limited partners or any kind of partner has nothing to lose when it's not getting one cent out of a deal. We have never, any of our limited partners never saw one nickel, but they did put in $564,000. Now, if that money was used that they had put into it, for buying and building, this luxurious complex known as Patchen Place, their money is in there no matter what form it is. That money has been converted into property. And that was the first intention of the whole partnership deal for investment purposes.

Now, having put that money in there, they can lose every cent that was put in. They never got any kind of reimbursement whatsoever. How can they say that we don't have anything to lose? We have everything to lose that we put into it.

THE COURT: Well, I take it, without going any too deeply into this thing, that the translation of the property into money will reflect some kind of a return to the partners.

MR. BERGER: There has been a return, Your Honor.

THE COURT: Please? But I mean in the future. I'm talking about as a result of this deal.

MR. BERGER: There would be. In fact, there was money already returned when the Unit, Incorporated took out every bloody cent -- excuse the expression -- that came in. They should have paid $29,000-plus per year to the partners, and it so states in the audit statement of their auditors, Ernst & Ernst. "The general partner has guaranteed that in the years

1974 through 1978 the limited partner shall receive from the partnership or directly from the general partner a minimum guaranteed payment of $27,962 per year. Any such guaranteed payments made by the general partner due to insufficient profits or net cash flow of the partnership shall not be recovered by the general partner either from the partnership or the limited partners.

Now, there was money to be paid here. In addition to the money that was to be paid here there's a provision in the partnership agreement which has been overlooked by counsel that the partner, the general partner, Unit Properties, should not receive any money for the management services.

MR. UNGER: I hesitate to interrupt, but we are here to argue on standing, not argue on the merits of Mr. Berger's proposed case.

MR. BERGER: Now, just a moment: I didn't interrupt you.

MR. UNGER: But I would like to keep -- before the Court.

MR. BERGER: Yes, I know we're before the Court.

MR. UNGER: And we're before the Court on a stand issue.

MR. BERGER: We're before the Court. His Honor asked me whether there were any profits and I say to Your Honor, "Yes, this is" --

THE COURT: I'm not saying whether there are any profits. I asked you if there isn't going to be some kind of a return to the limited partners as a result of the sale of this property.

MR. BERGER: No. There can't be.

THE COURT: None whatsoever?

MR. BERGER: There can't be. The only thing that can happen for the limited partners is that each of the limited partners with a full share will suffer a tax recovery of $102,000 which they will immediately have to pay Uncle Sam because of the so-called tax shelter that they were given advantage of.

THE COURT: But is that a reason to turn down this sale at this time?

MR. BERGER: Yes, sir. Yes, sir. Because that is a detriment, that's not to the best interest of the partners.

THE COURT: Didn't you get a break on that all through the years?

MR. BERGER: No, sir.

THE COURT: On your tax statements?

MR. BERGER: No, sir. No, sir. Yes, we got a break, but the break came, this is what I mean, after the break. $102,000 is after the break, that we got. We will still have to pay tax on $102,000, which could go up to 70 percent, maximum.

Now, the management fee here was money that should have gone to the partners. It did not go to the partners. In addition to that, they never gave us any information. Four years they have been in reorganization and none of us has ever gotten a notice that this was a reorganization, Unit was a reorganization, until we got a copy of the order authorizing the sale. We have never had a chance to protect ourselves 'til now. We never had an opportunity to come in and object to this.

THE COURT: To what?

MR. BERGER: To the sale.

THE COURT: You're doing that now.

MR. BERGER: Well, that's right, upon five days' notice, sir. The last time we had five days' notice and two of those days were the weekend, and now we're blamed for not having come in following the rules, et cetera. That's why we asked for a postponement, Your Honor, which we thought we would get and bring in all of these things.

Now, I'd like to bring out the fact, sir, that this is the first time that I know of where property of a partnership is being sold out to the debt of a partner.

THE COURT: For the what?

MR. BERGER: For the debt of the partner. Unit Properties is in reorganization; B & B Properties isn't. B & B Properties has a luxurious piece of property and we have information to the fact that the people who are buying Unit have already decided to go into condominiums and will gain a profit of somewhere around $5 million as a result of this sale.

MR. UNGER: A little bit of hearsay there, Mr. Berger.

MR. BERGER: Now, we were not consulted. We were not counselled. I can prove this at the proper time if we're going to take testimony -- we were not consulted about this sale. Everything in here is a statement that evidently in the order of Your Honor is a statement, based on statements that were made by counsel rather than any testimony. We had no right or haven't been afforded the opportunity whatsoever to cross-examine witnesses who should be under oath. We know here that there are going to be closing costs and fees of $500,000 coming out of this. Perhaps we would have had a better chance to make a better deal and not have to pay $500,000. $300,000 is commission and the rest should be fees, according to the way I read this. And everything in here is stated that it's for the best interest of the limited partners; and it's disaster for the limited partners. They're going to have to be paying more in taxes than they ever got out of this deal. The taxes will eat each one of them up if this deal goes through.

Now, it doesn't have to be a benefit; it could be a detriment, and this is a great detriment to each one of these partners.

Now, in this order, and I wish Your Honor to know that I'm not criticizing anything that's happened in this court, --

THE COURT: You don't have to worry about that.

MR. BERGER: I say this: From debtor's application and this hearing this Court has determined that the sale of the real estate in accordance with the terms of the land contract is fair and reasonable. On what evidence, sir? On whose statement? How do we know that this is true?

Again, the sale is in the best interest of Unit and its creditors, and this is the part, that as it will permit Unit to receive a substantial amount of cash which otherwise would not be available to it over the short-term and will allow Unit to receive additional monies over the next months as payments on a promissory note.

Your Honor, is this all for the benefit of Unit? How can our property be sold under any circumstances? Just for the benefit of --

THE COURT: That's what we're here to determine today. I see what you're driving at, don't misunderstand me. But he's saying that you have no standing.

MR. BERGER: But if that's the case --

THE COURT: That's what his position is now, and you're supposed to refute it.

MR. BERGER: Yes, and I am refuting it.

THE COURT: From the document itself show me that you have a standing, that's all I want to hear, and I'll certainly do something about it.

MR. BERGER: Let them show us that our money that we put in was exhausted. We have no way of knowing that. All we know is that we got so-called tax benefits that are going to go ahead and boomerang at us. We put in $564,000.

THE COURT: Let me try to nail this thing down. I mean I want to get this thing at the bottom. According to the reading of this document, Mr. Unger is saying, and that's what I want you to direct your efforts at right at the moment, that since you have no longer any liability as limited partners in this partnership, that's when your right to participate in any voting or objecting power ceases. That's his contention. Now, how do you get around that, that's what I want to know.

MR. BERGER: I'll get around it this way, Your Honor: If that is the case, from the very moment that we became limited partners we were not liable for any debts, so the whole thing is a superfluous statement.

THE COURT: Well, that's what I mean. Why is something like this in an agreement?

MR. BERGER: I don't know. They drew the agreement, it was their attorney that drew the agreement. None of our limited partners had anything to do with it and we say there's an ambiguity in this agreement and therefore we have the right to ask the Court to resolve the ambiguity in our favor. We say that the partners were handed documents by the promoter of this whole deal, we say that it was all in there for investment, we say that it's our investment that could be washed out, we say that as late as 1978, Mr. Morris wrote the limited partners.

THE COURT: And aren't you putting it in evidenc at this time?

MR. BERGER: Your Honor, that's what I say. I'm willing to have a full hearing on this.

THE COURT: I want to confine myself for the moment to the sense or nonsense of this partnership agreement.

MR. BERGER: The sense or the nonsense is that we have everything to lose that we put into it.

MR. UNGER: It's lost.

MR. BERGER: Everything. He says it's lost. How was it lost? If it's lost at all I don't see it in any of these documents that there was a loss. The only loss that came out was as a result of depreciation, Your Honor, that's where the loss was.

THE COURT: I still want to get your legal thinking, and I'm not bickering with you, I just want to try to understand it myself. Where is that provision? 15, is it?

What the hell does that mean? "Without the written consent of limited partners liable for 50 percent of the losses of the partnership," et cetera, et cetera, you had it read to you, the partner, the general partner, can't sell it if it's over $100,000. Now, if there are no limited partners liable for any losses in this partnership it seems to me the general partner has an unrestrained hand. That's what I'm trying to get around.

MR. BERGER: That is absolutely, to begin with, inequitable.

THE COURT: That's what I want you to show me.

MR. BERGER: Now, the general partner for its own debts, would be able under that interpretation as soon as the money was used to divide up among the promoters and the limited partner, and the special limited partner, as soon as that money was divided up we would no longer have any static because it was lost. But it wasn't lost, Your Honor. It was put into other assets, into the form of other assets.

THE COURT: I appreciate it. I know what happened. But the point I'm trying to get you to meet is it says here that if the partners aren't liable for any more losses, which at this time and place in history, 1980, there is an application to sell, what standing do you have?

MR. BERGER: We have standing because even under the income tax laws it says here, "partners' share of liabilities." Every partner had a share of $227,000 worth of liabilities. They are liable on that. If they are not liable elsewhere, they are liable to Uncle Sam, but they are liable to $227,000.

THE COURT: For what?

MR. BERGER: Because they took accelerated income tax deductions out of the partnership and at that particular time they became liable for a lot more.

THE COURT: Are you trying to tell me that because they're going to be liable for their own taxes that that's the sense that "liability" is used in this partnership?

MR. BERGER: Yes, sir. Yes, sir. It is

absolutely necessary for this Court to decide and to consider the fact that they never got a dime out of it and now they're going to have to pay on liabilities of $227,000.

MR. UNGER: Objection.

MR. BERGER: And that is not to the best interest of the partners, by any means. And this Court has determined, according to the order, that the sale is in the best interest of B & B Properties as it is so material to the rehabilitation of Unit. Therefore, absent the most extraordinary reasons, it would be unreasonable for any limited partner of B & B Properties to withhold consent of this sale. The extraordinary reasons are that we're going to have to pay taxes that we owe as a result of this enterprise and that we're going to lose a very valuable investment that we have nothing at all to do or any word to say that the sale was made properly, that there was any of these things. We haven't even had a chance to audit anything. That's why Your Honor granted us 90 days in order to make discovery and see what we could do to save ourselves, and we really need to be saved.

Mr. Hahalyak wanted to say something.

MR. UNGER: I object to being double-teamed, Your Honor. May Mrs. Kindle argue next?

THE COURT: Yes. Sure.

MR. UNGER: This is an unusual trial procedure. They may do it in Pittsburgh but I don't know about being double-teamed is something --

MR. HAHALYAK: Maybe one person represents some partners and the other --

MR. UNGER: They know, Your Honor, when you read their pleadings.

MR. BERGER: Mr. Hahalyak is one of the limited partners for a whole share and has a chance to come up with a nice big bill, if he can pay it, possible sale on $227,000.

MR. HAHALYAK: Your Honor, --

MR. UNGER: Objection. That is not factual. I suggest, Mr. Berger, that you limit your comments, when you try to get evidence in, to the facts.

MR. BERGER: I do have everything in --

MR. UNGER: Mr. Hahalyak does not have a negative basis of $227,000, Mr. Berger, be factual.

MR. HAHALYAK: I will be factual with this, I hope, Your Honor, because I think we have appreciable confusion on this simple point. First of all, let me say that this is an oral argument. Because it's an oral argument there have been no prior hearings. I'm totally incapacitated from having any evidence before me in which to refer to you so that we could make a proper disposition of this question.

One cannot argue where there are no pleadings and no facts of record. All I have to do now is try to pick up something that seems to convince Your Honor of the total baseless position taken by Unit, Inc. Let me say that we have filed preliminarily here an objection to the jurisdiction of the Court. I reserve that objection. Subject to that objection I proceed, Your Honor.

Now, secondly, let me say that we had also made an objection because there has not been procedural due process. In other words, we have never been notified of the sale of this particular piece. We were never made parties to this particular proceeding. We were never given a complaint on which we could answer. We were never afforded an opportunity to answer and to have a hearing on that complaint. We come here really in the last seconds, told to hurry up on a most crucial matter that affects us appreciably. We've got to remember one important fact and that is that B & B is not in bankruptcy. Unit, Inc. is in bankruptcy. This Court is here to protect B & B, because B & B is not even listed as a creditor. In other words, what we have is Unit, Inc. with a fiduciary duty under the partnership agreement to the partners, limited partners; whereas, the conflict now takes place where Unit, Inc. comes in for the benefit of the creditors and this Court must focus its attention to those creditors and for their needs. We have an absolute conflict and this Court must place itself in the position of Unit, Inc., it can take no other position, it's got to project itself into Unit, Inc., and its rights are no greater than that of Unit, Inc. Unit, Inc. has gone into bankruptcy, into Chapter 11. Being in Chapter 11, Your Honor, could dispose of Unit, Inc.'s interest. That it could do. But don't dispose of the interest of B & B partners who are not here. And that's precisely what you're doing.

Now, this order that was entered, and I'm sure it was prepared by counsel on June 19th, states facts that are false, states facts that are complete distortions of what the effect is on the limited partners. And let me point out to you --

THE COURT: You're talking about my order?

MR. HAHALYAK: Your order, Your Honor, and I'm sure it was prepared by counsel and not by you.

THE COURT: Let's not worry about that. If I signed it I'll stand up for it or I'll go down with it.

MR. HAHALYAK: Let's take a look at that order and let's see what we have here.

MR. UNGER: Does this go to standing, Your Honor?

THE COURT: Yes, it does. If I signed an order that's not right it's going to be corrected.

MR. HAHALYAK: Your Honor states in this order from debtor's application in this hearing, this Court has determined that the sale of the real estate in accordance with the terms of the land contract is fair and reasonable. The sale is in the best interest of Unit and its creditors as it will permit Unit to receive a substantial amount of cash which otherwise would not be available to it over the short term and will allow Unit to receive additional monies over the next months as payments on the promissory note fall due.

In addition, this Court has determined that this sale is in the best interest of B & B Properties. B & B was never present to determine that question or to give you the insights on this. As it is so material to the rehabilitation of Unit, Inc. You see, you're projecting your thoughts on Unit, Inc. Your duty is to put yourself in the position of Unit, Inc. And what is the duty of Unit, Inc.? The duty of Unit, Inc. under the law is clear. It is a fiduciary. It owes a duty to the limited partners. It must protect their interest and Unit, Inc. cannot sell any assets that will bring a dissolution of that partnership. It cannot.

In other words, a general partner cannot destroy a partnership. The law is clear on that particular point. I would give you, Your Honor, the citations on it if you would so desire.

THE COURT: You can do that later, that's all right.

MR. HAHALYAK: The uniform Limited Partnership Act restricts the general partner's authority in a number of ways. He may not without written consent or ratification of the specific act by all the limited partners do any act in contravention of the certificate, do any act which would make it impossible to carry on the ordinary business of the partnership. We couldn't carry on. This terminates our partnership. We're dead. Why? Because this asset which constitutes the partnership business is taken away. You have deprived this partnership of its existence. You have not acted for the benefit of the partnership as required of you under the partnership agreement being in the shoes of Unit, Inc., Your Honor.

Now, it states, "Therefore, absent the most extraordinary reasons it would be unreasonable for any limited partner of B & B Properties to withhold consent." Counsel says further that this is to the great benefit of B & B Properties of the limited partners. If that is so, if there was ever a distortion on the record in any court, it's committed right here and now unwittingly.

MR. UNGER: Where does it say "great benefit," Counsel?

MR. HAHALYAK: Let me locate that.

MR. BERGER: First part.

MR. HAHALYAK: I'll give you that shortly. I have that. I have the letter that was sent with the order, Your Honor. It's probably here.

MR. UNGER: Mr. Hahalyak was purporting to quote from the order, Your Honor.

THE COURT: Yes, that's what I understood.

MR. UNGER: He said the order states that it's to the "great benefit of B & B," and I can't find that quote.

MR. HAHALYAK: If I have the application also for your authorization, sir --

MR. UNGER: You're purporting to quote from the order.

MR. HAHALYAK: Let me say, Your Honor, I have in front of me the letter signed by Unit, Inc., in which the order's enclosed and let me say that the last sentence of this letter provides Unit believes that this sale is clearly in the best interest of the partnership. Then in the order and in the application there are similar passages. I am seeking to locate that.

MR. UNGER: Find it in the order, Counsel. You're quoting from it, purportedly.

MR. HAHALYAK: Yes, here it is. "Great benefit." Let's see now. Wait.

THE COURT: I want to find it myself.

MR. UNGER: I submit, Your Honor, you won't find it.

THE COURT: No. I want to find the order. Here it is. Is this the order authorizing exchange of partnership interests? That's not the same thing.

MR. UNGER: Order authorizing sale of assets.

THE COURT: I got it. All right. Go ahead.

MR. HAHALYAK: Let me state, Your Honor, that we have clearly in this particular passage, in addition, this Court has determined that this sale is in the best interest of B & B Properties, and so on.

MR. UNGER: Where is the big "great benefit" quote, Counsel?

MR. HAHALYAK: We will come to that. I'm sure we have --

MR. UNGER: It's only two pages long. I'll agree to a recess if counsel would like to read it more carefully.

MR. HAHALYAK: Let me modify that statement, Your Honor, that in his letters to the partners, that is, in the letters of Unit, Inc., counsel for Unit, Inc., to the partners, copies of which were sent to the Court and are on file, that Mr. Morris represents that this sale is clearly in the best interest of the partnership. He had so represented this to the limited partners. This is a fraud on the partners, a fraud for this reason.

MR. UNGER: Does this go to standing, Your Honor?

THE COURT: Yes, it does.

MR. UNGER: Okay.

MR. HAHALYAK: Fraud for this reason, Your Honor: If this sale were consummated, in the year of the sale each limited partner would be subject to a tax that would be greater than all the benefits that he had during the past 10 years, or from the inception of the partnership. In other words, he would be subject to a tax of probably not less than 32,000 per unit and, in all likelihood, $64,000. He not only loses his interest as a partner, the partnership is dead, but he's got to come in that very year with money out of his pocket and give it to Uncle Sam, $64,000 based on the factor if this were pure income. It certainly would not be under $32,000. Imagine that to the best interest of the limited partners.

MR. UNGER: Think it might be capital gain, Mr. Hahalyak?

MR. HAHALYAK: If it's capital, it's not under $32,000, sir. Not under $32,000.

THE COURT: Let's don't carry on like this again. Let him complete his argument.

MR. UNGER: Okay, Judge. I'm sorry.

MR. HAHALYAK: Now, did any of the limited partners -- were they aware of this, were they ever notified by anybody, other than that this would be to the best interest of B & B Properties? Isn't it a fraud whenever you say that this is to the best interest? I'm asking you. Lose everything you've got and not only lose it but you've got to come up with at least $32,000 in cash that very year. And you're going to pay back more than anything you ever received, tax-wise, far more. This is a clipping of the first order.

Now, Your Honor, the counsel in his brief has argued that the terms that you have said form the crux of our argument today, that is, what is meant here by 50 percent of the limited partners liable for debts.

It means only one thing. It means 50 percent of the limited partners. The limited partners are liable up to their contribution. The limited partners, insofar as the accounting procedure is concerned and the records, are always, at all times subject to the losses. For instance, in Schedule K filed currently with the government -- may I have your Schedule K.

MR. BERGER: You have it.

MR. HAHALYAK: This is what the Section I states of Schedule A, 1979. Partners' share of liabilities.

Now, they're referring to the limited partner. This is for the year 1979 for one of the partners with a half share, $113,949.

MR. UNGER: Is this evidence, Your Honor?

THE COURT: What are you reading from?

MR. HAHALYAK: This is from the Schedule K, sent by Unit, Inc., to the limited partner of the government form filed.

THE COURT: All right. I think you're going beyond what we're here for today. I want you to confine your thinking to that same clause that bugs me about that 50 percent of the losses. I appreciate that you're throwing a lot of weight into this thing, and I'm glad you are, but how do you get around that damn thing?

MR. HAHALYAK: Let me say this, let me begin this way, Your Honor: First of all, if you look at the order of June 19th, you will discover in that order an admission by counsel that the consent of the limited partners is necessary. Let's look at that order.

THE COURT: You mean the order of this Court?

MR. HAHALYAK: That's right.

THE COURT: Uh-huh.

MR. HAHALYAK: And also the correspondence written by counsel. Counsel and this Court recognize the fact at all times it's never been disputed that the consent of the limited partners is necessary. No question about that.

MR. UNGER: It's been disputed, Counsel. It's been decided --

MR. HAHALYAK: Let me argue this. After we came in to contest this and he discovered that he couldn't get the consent of the limited partners, then he changed his tactics and said that this means something else which is an absurd interpretation given by him. It has no basis. The two cases signed by him have no relevance to this particular point whatsoever. The limited partners are at all times liable 50 -- if a vote is necessary of 50 percent of the partners, it's 50 percent of the limited partners liable for debts. They are liable today as they were at the beginning, and will be. If you check the records of the Unit, Inc. you will find on those records that they recognize this liability and on the government form of Schedule K -- I'm not putting that in evidence -- you will find, Your Honor, that there is a clause particularly stating partners' share of liability. This is limited partners subject to liability. Now, if a half vote is near -- 50 percent vote is necessary, you say limited partner is subject to 50 percent of liability. Now, this partner who's returned -- let's say you could take one, his liability is shown in Schedule K. It's referred to specifically by Unit, Inc., not by me, as to the partners' share of liabilities. That's what that means, nothing more.

There could be no other interpretation that is reasonable. We reviewed his cases and they are not in point. We had even gone to counsel who prepared this and said we want to know -- here is an interpretation given by counsel that's novel, we can't believe it could possibly be so. Nobody that we ever contacted said that this could be a reasonable interpretation. They all stated it is unreasonable and absurd.

MR. UNGER: Hearsay.

MR. HAHALYAK: The persons who had drafted this said that this is pure nonsense. What is meant is 50 percent of the limited partners, and that's the answer. Limited partners continue to be liable. The law is clear on that point and the government recognizes that. Now --

THE COURT: How do they continue to be liable?

MR. HAHALYAK: Well, Your Honor, their liability is a liability as partners, they continue at all times to be liable under the partnership law. There is no elimination of liability. The only limitation --

THE COURT: Wait a minute. I'm just trying to get to some basic limited partnership law which I'd like to clear up. I could have a misunderstanding. I want to know it. But I always thought that the limited partner was limited to the extent of his investment, period. That he is gone, he has no further liability for further losses of the partnership, does he?

MR. HAHALYAK: Oh, he has. He has a tremendous liability, Your Honor. I will just point out to you the great liability. If, for instance, this property were sold, the United States government would say, come in with at least $32,000 this year because of that sale. Why? Because I'd have the assets and liabilities in the past, you see, and this liability was already taken advantage of, but since the sale they must now --

THE COURT: You are interpreting that clause to mean then further losses to the partners themselves as a result of the sale, if you had to kickback some taxes. You're saying that's a liability which is covered by this clause in the partnership agreement. Is that right?

MR. HAHALYAK: And not only that, Your Honor, but it's the deferred liability.

THE COURT: Sure, it's -- all you're doing is deferring the payment.

MR. HAHALYAK: In other words, any limited partner, Your Honor, never gets away with any benefit. All the government says is instead of you paying the tax initially, we'll let you pay it later on; that's all it is. On the other hand --

THE COURT: Well, isn't that what we're doing now?

MR. HAHALYAK: Oh, no, we're going far beyond that. We're destroying the partnership, No. 1. There is no partnership when the sale takes place. No. 2, our interest is being confiscated and that has ruined us because we've got to come up with money. There is liability of the first order.

Deferred.

MR. BERGER: Now, Your Honor, let me ask you something. Maybe I'm going astray, but I'd like to cut through some of the junk that we get into on these things. What can we do now that Unit, Inc. can get something out of this deal and, at the same time, not disturb your partnership?

MR. HAHALYAK: I think the only thing, the only authority that this Court has, Your Honor, and I speak very respectfully, is to put itself in the place of Unit, Inc. Whatever Unit, Inc.'s interest is, it may sell, not beyond it, you see. Now, let me -- and this is very important to this argument -- let me go further.

THE COURT: Did you want to say something, Mr. Unger?

MR. UNGER: Well, I just wonder if we can agree on some reasonable division of time since they're double-teaming me. Now, they've now had the floor for 35, 40 minutes. Can we have some time limitations?

THE COURT: I've never taken away an opportunity, Mr. Unger, for you to use your reputation.

MR. UNGER: It will be 5:00 o'clock at the rate they're going before I can respond.

THE COURT: I'm willing to stay here 'til 5:00 o'clock.

MR. UNGER: I'd like my chance, though.

THE COURT: You'll get it.

MR. HAHALYAK: Your Honor, let me state this, and I think this is extremely important in understanding this entire proceeding. This was filed under Chapter 11. It's not an ordinary bankruptcy. The idea here is to see that he gets protection from creditors so he can carry on that business. It's to carry on the business, to see that everything is preserved as best as it could subject to this plan that takes place. The creditors are the important persons. They come in and they form a plan to see what's the best. And this plan hopefully works out rather than reverting it to ordinary bankruptcy.

Now, Unit, Inc. owed to the limited partners $28,000 approximately a year. It owed this for a period of four or five years. It was in default on this, and the liability was to be guaranteed by the general partner. Unit, Inc. is now in bankruptcy. They were duty bound to notify you that we were a creditor. They were duty bound because we would have received notice from you and we would come in here as a creditor to see that a proper plan was made. We never got that notice. Look at the returns filed.

THE COURT: If you're going to attack the bankruptcy proceedings insofar as Unit may have omitted creditors, I think you have to do that at another proceeding at another time.

MR. BERGER: I'm pointing this out as to --

THE COURT: If you're a creditor of Unit, Inc. you should be listed as a creditor, and if Unit didn't consider you as such, I can't help that, in other words.

MR. UNGER: Come on in. We'll have a standing for that. If they want to make a claim, let them come on in properly. Your Honor, this is a standing issue on the sale.

MR. HAHALYAK: Your Honor, we're going into the bona fideness of the croacher. Whether this is in good faith by Unit, Inc., and I say they're committing a fraud.

THE COURT: I'm impressed with your argument, and I want to Hear Mr. Berman direct his attentions to that. First of all, a lot of those findings in that order seem to be a little far-fetched, as far as I'm concerned. How much it affects the validity of the sale, I don't know. But the thing that concerns me is your point that Unit, Inc., acting in a fiduciary capacity as a partnership, is in a double-barreled proposition except making this sale, and the fact that, according to you, ruins the partners to which it has some kind of fiduciary relationship and at the same time helps itself, bails itself out to the extent that this sale will do that. So, from that standpoint I'd like to hear Mr. Unger re-direct his --

MR. BERGER: Why don't I just read --

THE COURT: Very good.

MR. BERGER: Your Honor, let me read from the partnership agreement by which you would be presently bound. Let me read from page 18 of the partnership agreement.

May I have that?

From this partnership agreement, page 19, Your Honor, -- oh, yes, 18 -- take the bottom of the page.

THE COURT: Now I lost the agreement.

MR. BERGER: In connection with --

THE COURT: All right. 19?

MR. HAHALYAK: 18, Your Honor, bottom of 18, then we proceed to 19.

In connection with the acquisition of interest in this limited partnership, the corporate general partner, Unit, Inc., the special limited partner and each of the individual limited partners hereby represent and warrant to the partnership and to each other that such interest is being acquired for investment, not selling, Your Honor. And not with a view to or for resale in connection with any distribution of such interest. There is no authority for this.

THE COURT: For what?

MR. HAHALYAK: For the sale. The purpose.

THE COURT: What about the previous provision?

MR. HAHALYAK: That previous, Your Honor, does not apply.

MR. BERGER: For the sale of the sole asset.

MR. HAHALYAK: Yes.

That provision, Your Honor, I think we have shown that where you have, let's say, bankruptcy that he says is not here, or you have these other events that take place, then 50 percent of the partners or two-thirds of a percent of the partners may move in. But this is the purpose of the partnership agreement. This as a guideline must be abided by. Now, let me go further, because there are violations of law here, insofar as the possibility of sale, and this is so indicated in this partnership agreement.

By such representation each party means that they intend to hold such interest for investment for their own account, and that they do not intend to dispose of all or any part of such interest in the foreseeable future.

Now, let's get down further. About two-thirds of the way down.

Each party realizes, and I'm sure Unit, Inc. must at this time, that in the view of the Commission a purchase now with an intent to resell by reason of any --

THE COURT: This applies to something not germane.

MR. HAHALYAK: Oh, it is, Your Honor, because there's criminal liability here. There was liability here that must be looked at.

MR. UNGER: It has to do with the SEC -- with the registration facts, Your Honor, and I'll respond to this at a later time.

MR. HAHALYAK: You have a problem with the SEC, I'll tell you that. Let me read it, because here's what the SEC says: "Each party realizes" -- and they want to put you on notice now -- "Each party realizes that in view of the Commission a purchase now with an intent to resell by reason of any foreseeable specific contingency or anticipated change in market values or any condition of the partnership," --

it's your bankruptcy here or Unit, Inc.'s -- "or in connection with a contemplated liquidation or settlement of any loan obtained by any party for that position of such interest and for which such interest was pledged as security, would represent a purchase with an intent inconsistent with this representation" -- that is the one above -- "to the partnership, and the Commission might regard such sale or disposition as a deferred sale as to which the exemption is not available."

What does that mean? That means there are liabilities that are tremendous. That means that all the benefits tax-wise could be eaten, could be destroyed and taken away. There is nothing clear within this partnership agreement, Your Honor, that says that this is to be an investment. This is not for resale and I respectfully submit to you that there is no authority that you have greater than what is represented in this agreement which must be followed because this is the criteria. You are in the shoes of the partnership at this time.

Now, this investment was also recognized by Unit, Inc. In their letters to the partners, Unit, Inc. had repeatedly said that we're looking toward this as a long-term investment and we are here to protect this long-term investment by you.

MR. BERGER: You should have it there.

MR. HAHALYAK: All right. Now, in their letter to the limited partners, as late as May 25th, '78 in the bankruptcy here --

MR. UNGER: Judge, are they still standing?

THE COURT: I'll have to cut you down to about 10 more minutes.

MR. HAHALYAK: We have always felt that Pachen Place is best regarded as a long-term holding and so on. Accordingly, the on-site management is implementing a gradual program of permanent physical improvements which will upgrade the property and position to further enhance its tenant profile, as the area around it continues to develop.

Now, this long-term investment is part of the purchases set forth in the partnership agreement. There are other letters, Your Honor, and because I cannot go into the -- because I cannot introduce evidence, I may tell you there are other letters by Unit, Inc. in which they refer to these long-term investments.

Now, I come back to one point that I think is extremely important here and I say this is a fraud on the limited partners by Unit, Inc. They did not list limited partners as creditors and yet, in every one of their reports issued by their financial agents these debts each year are shown as owing to the limited partners. How they can show that in their financial return and not show it to you and not have you notify us so that we can be put on notice, I don't understand except for one reason: They're seeking to do what they're doing right now without notice and getting away with it. They have no right. They're usurping everything. They're taking away the rights of individuals that are not properly represented and they're leading to financial bias.

MR. UNGER: I agree that they're not properly represented. I'll stipulate that.

THE COURT: I don't know what you're talking about, but please don't interrupt the gentleman when he's talking.

MR. UNGER: Counsel said that the limited partners are not properly represented.

THE COURT: You know my attitude toward your interruptions.

MR. HAHALYAK: Now, if Your Honor please, in the order of the Court authorizing this sale, money is to be disbursed and how is the order made? It's made to go to different persons, Unit, Inc., and so on. The only person that gets any money out of the sale, let's say if there would be one, and certainly there should be none. If there would be, the only proper person to receive that money would be Unit, Inc.

On the other hand, if you look at this order, you'll see what they were doing. They were doing far more than that, Your Honor. Of the purchase price of $5,300,000 B & B Properties will receive a sum of one million cash, less closing costs and fees. Of this sum, Unit will receive approximately $500,000 in cash as partial payment, approximately $100,000 will go to limited partners. The balance of 675 -- let's see now -- the money then is, in other words, the purchase price here is given to persons other than B & B Properties. It's given directly to Unit, Inc. It can't be done. This goes to B & B and only B & B. But I'm not interested in that. I'm merely saying that in the order there could be no allocation of money to anybody other than B & B Properties and the partnership. They're the owners of it. If I sell property, the money must come back to me. It doesn't go to others.

from myself there, it could be pursuant, if I'm in bankruptcy or whatever it may be, it could then go pursuant to what B & B says, not Unit, Inc. This is a terrible error to have this money go to Unit, Inc., instead of to the real owner, B & B Properties. Unit, Inc. is not the owner of this.

MR. UNGER: Reread the order.

MR. HAHALYAK: I have.

I see no reason why Your Honor cannot sell the interest of Unit, Inc. There is nothing we can do to stop that. We would have no right to come in to object. But to affect us is another question, and this affects us to the point of extinction, that I could not bear, I couldn't possibly bear. I have a family of four and I can't meet --

MR. UNGER: Objection.

THE COURT: The Court sees that point very lucidly.

MR. BERGER: Depends on what you put in.

MR. HAHALYAK: Your Honor, also in the bankruptcy rules I believe that under Chapter XI, sales of total assets are a rarity. That's the purpose of Chapter XI, to see that this thing continues and operates, you see. I can only say that what he is seeking now violates all of the findings in the prior order of the Court of June 19th, that is, that the notice of the limited partners, the consent of the limited partners has been given. You have already received all of those consents from each and every partner, I believe, or just about 90 percent of them.

Let me say to Your Honor that his interpretation of that clause would never be upheld, would never be shown, would never be explained in any case. There is no such case giving it the interpretation of this, and that is that 50 percent of the limited partners liable for debts, every partner or limited partner is at all times liable for debts, theoretically, under the law of partnership. There is no removal of that liability. And this is so stated in Schedule K, where they themselves say that this is your liability. In fact, I would say that that's a copy of their language from the Schedule K that they themselves had shown and that the government requires.

MR. UNGER: Ten minutes are up, Judge.

MR. HAHALYAK: Well, I'm sorry.

THE COURT: That's all right. Go right ahead. We'll take about a 10-minute break so you can organize your thoughts.

(Thereupon, a short recess was taken.)

THE COURT: Yes, sir.

MR. HAHALYAK: If Your Honor please, I'll seek to terminate this shortly. If Your Honor will turn to page 9 of the partnership agreement.

MR. UNGER: I thought they rested, Your Honor, and you gave me a recess to give me time to get my thoughts together. That's what I thought, but maybe I misinterpreted it.

MR. HAHALYAK: This will be not more than three minutes, sir.

THE COURT: All right. Don't keep your eyes on the clock.

MR. UNGER: I intend to.

THE COURT: What page?

MR. HAHALYAK: Page 9, Your Honor. It says in the first paragraph, after the sentence above: "For the period following the earlier of October 1, 1973 or final endorsement by the FHA and through December

31 of that year and for each succeeding year, all limited partners in the aggregate, profits and available cash flow, 100 percent," and so on. And underneath notice the word "Losses. All limited partners in the aggregate, loss is 75 percent." For what year? For the period following the earlier of October 1, '73 or final endorsement by FHA and through December 31 of that year and for each succeeding year, that's what is meant by it, Your Honor.

THE COURT: By what?

MR. HAHALYAK: By the losses, profits of the partners, 50 percent or 60 percent of partners liable for losses. There it is, "each year all limited partners, losses 75 percent." This is a continuing. You know, you can't -- each year these limited partners are charged with losses on the forms filed with the government. Every year.

THE COURT: That's right.

MR. HAHALYAK: If they're subject to losses here, they certainly have to have this type of liability, you see. And this is shown also --

THE COURT: I thought this was just allowing them the losses which they could deduct from their income taxes.

MR. HAHALYAK: No, Your Honor.

THE COURT: When I'm talking about liability, I'm talking about if Unit, Inc. should go out on behalf of B & B and there would be a big automobile accident and they would be sued for half a million dollars, would the partners be liable for that at this point, the limited partners?

MR. HAHALYAK: The limited partners are liable to the extent that I have mentioned.

THE COURT: To their investment.

MR. HAHALYAK: Right, to their investment. That's the purpose of the limit. Now, let me say this: That this tax matter that you speak about, we did not get a tax benefit. We get it initially and we pay for it later. It is a deferred benefit. In other words, every penny that we took advantage of or the government permitted, both the limited and the others, tax-wise, later on every penny of that is paid.

MR. UNGER: Three minutes.

MR. HAHALYAK: There's a deferment on that payment. You don't eliminate it, Your Honor.

THE COURT: That's what you're being faced with now, as a matter of fact, aren't you?

MR. HAHALYAK: That's right. And to recapture it, would be at a point where we would pay more now than any benefit we ever received before, you see.

THE COURT: Yes.

MR. BERGER: Those were the losses that were attributed to you.

MR. HAHALYAK: But I do want to point out that in your partnership return the mention was made of continuing year-to-year losses. In the Schedule K mention is made of partner's share of liabilities. They put in the "partner's share" of this, continuing each year and increasing each year, as will be shown in their returns filed in Schedule K.

I want to make one other statement, Your Honor, and that is, sale of property. In rules of bankruptcy it's stated that in a Chapter XI case a sale, other than in the ordinary course of business, would be exceptional. Now, I may say that as a fiduciary, if they have continued as a fiduciary, Unit, Inc., they cannot, and I quote specifically from 60 American Jurisprudence 261, "He may not, that is, the general partner, without the written consent or ratification of a specific act by all the limited partners do any act in contravention of the certificate, do any act which would make it impossible to carry on the ordinary business of the partnership." This could terminate us. He can't do it. There's no authority, your Honor, and I say say that anything that is exercised, and I say this respectfully, by you must be within the authority of that partnership agreement.

MR. UNGER: That's five minutes. May we now do something, Your Honor?

THE COURT: Do you want to make a rebuttal?

MR. UNGER: I'll try not to take as long.

I'd first of all like to introduce Mr. Tom Burnett, who'd like to say to counsel from Lexington, Kentucky, with the permission of the Court, Mr. Burnett would like to say a few words on behalf of the purchaser before I make my rebuttal, and I don't want him to get lost and not be able to talk.

THE COURT: All right.

MR. BURNETT: I came to observe mostly, but also to inform the Court of a very serious problem which we have. We have investors with net worths of somewhere between ten to fifteen million dollars in this project, but the ones who are putting up the $500,000 cash are seeking to withdraw from the partnership because of thm delay involved. And I think if the thing drags on, all of this arguing is going to be moot because you're not going to have a purchaser for your property, and that is the problem that we're faced with. I, quite frankly, do not think we still have them today.

THE COURT: What was that again?

MR. BURNETT: I, quite frankly, didn't think we'd still have them today, but we do have them as of today. Now, how much longer we're going to be able to hold them I don't know, but that is a very serious problem that is facing us and, as I say, I don't know any way around it, except inform the Court of what that problem is. We have had half a million dollars in the bank for 17 days, that these gentlemen by their objections have caused us to stay there. There has been no bond posted, there's been nothing to save us from damages if it turns out that they do not have standing. There is nothing to protect us from the injury and expansion and so forth that we've been through during the period of time that this has been drug out. If they're talking about 90 days to complete proof, I know we're out, there's no question.

MR. HAHALYAK: Your Honor.

THE COURT: You must remember that in a situation like this when you're dealing in the bankruptcy court that's one of the things that you always have to recognize that somebody may come in and object to something. I can't help that.

MR. BURNETT: I understand that.

THE COURT: And it would be nice if everything would just run smooth and everybody would say, "Fine, go right ahead, it's okay with me," but that, you know, is the way it is.

MR. BURNETT: The point is that it is to the benefit of Unit, Inc.

THE COURT: I know. That's the point.

MR. BURNETT: That benefit is going to be lost.

THE COURT: These gentlemen are saying it's their disaster. Now, someplace in between there we have to make a choice in the decision.

MR. HAHALYAK: Your Honor, they cannot have the --

MR. UNGER: Objection.

MR. HAHALYAK: Let me say this.

MR. UNGER: May I have my rebuttal, Your Honor, without Mr. Hahalyak dominating the floor?

MR. HAHALYAK: One sentence.

THE COURT: I listened to it, that's all right, Mr. Hahalyak.

MR. HAHALYAK: In that agreement it says that it's subject to limited partners' approval. His own agreement has that, Your Honor.

THE COURT: I'll go into those. Don't get too excited. You're too personally involved in this Mr. Hahalyak.

All right, Mr. Unger.

MR. UNGER: I'd like the record to reflect that Mr. Morris has six children, I have four, Mr. Burnett has three, Mr. Wilder has four.

THE COURT: All right. No comment.

You don't have to count the number of children.

MR. UNGER: We won't argue ex-wives and their expense.

The partnership agreement clearly says, "Without the written consent of the limited partners liable for 50 percent of the losses of the partnership." You can't, no matter how hard you try, twist those words to say liable to Uncle Sam for taxes you didn't pay. It's liable for 50 percent of the losses of the partnership, not your taxes. Now, I know we have one accountant sitting here. I know that when this partnership agreement was executed, by listening carefully to Mr. Berger, he had been at the bar 42 years. I don't know how long Mr. Hahalyak had practiced, but I must presume he had some years under his belt when he executed this agreement.

MR. HAHALYAK: I wasn't a party to this, for your information.

MR. UNGER: I know that we have lawyers that reviewed it. The words say, "Without written consent of the limited partners liable for 50 percent of the losses of the partnership." Now, I submit, Your Honor, I'd like to respond to a couple of arguments that I think -- and I recognize that both Mr. Berger and Mr. Hahalyak are emotionally involved and I appreciate that. I'll try to be on my good behavior. We had a long time. I'm sure Mr. Hahalyak and Mr. Berger and their accountant and anyone else that's involved with the tax work understands that when you refer to your tax return, the partnership statement, that there is a fiction in income tax law that allows a partner, be he limited or general, to participate in tax write-offs on non-recourse lending to the percent of the partnership which he owns. He has no liability, but he may write off taxes as a fiction. It says liable under this fictional rule for non-recourse, which means you're not liable, but if any one of the partners guarantees it, then it is recourse lending and the limited partners may not participate. And that's the loss category that Mr. Hahalyak is talking about and I think he knows that, and I think it's more clearly presented to the Court to say that only can you write off losses you have no liability. But for, again, Mr. Hahalyak made much of standard language -- strike that -- of standard language put into a partnership agreement or other sale of interests that is not registered with the SEC, which says we have no present intent to resell. It doesn't say that this is an investment. We don't intend today to resell. But it doesn't say, "I swear forever and ever to the Securities & Exchange Commission of the United States I'll never sell this." Nobody makes investments like that. To make much of those standard words that simply give the partnership agreement an exemption from being from being blue-skied is really misleading to the Court, because we have experienced practitioners and experienced investors and they know what those words mean. I know what those words mean. And I'm sure the Court knows what those words mean.

They are there to state at the time of the investment no investor has the present intent to resell. That establishes an exemption. That's all that means. There is nothing in this agreement that contemplates never selling.

THE COURT: Well, listen, if you don't do that what happens?

MR. UNGER: You have to register, that's all, you just have to register.

THE COURT: You have to register with the Securities & Exchange Commission?

MR. UNGER: Probably this could have been blue-skied in Pennsylvania. Where do you put the words in it, because you don't buy it with the intent of reselling it. You buy it to write it off, as long as you can write it off, and there comes a time when it's not very profitable.

Now, attached to our motion to strike is an affidavit from Michael Mays that goes to partnership interests. There are 12 partners with 3.125 limited partners' interest, which cost them 23,500 and there are six partners, including Mr. Hahalyak, that bought two of those and said 47,000. In addition to writing off his initial 47,000, Mr. Hahalyak has written off $101,811.63. Now, I don't know what his tax bracket is or was during these years or is today. He has gotten his money back and he's gotten a tax-free loan, if he's in the 50 percent bracket, he has had an interest-free loan of over $50,000, of real dollars that he should have had to pay Uncle Sam. He's had the use of that money. When interest rates were 20 percent six months ago, he didn't pay any interest, and he didn't pay taxes. He got it by using the non-recourse provision of the mortgage to write-off interest payments, depreciation and whatever other write-offs there were.

Now, going into it, I'm confident everybody knew that they were writing off, taking accelerated depreciation. They wanted their money back as fast as they could get it. Now, what will happen to these gentlemen, more accurately stated, is that some portion of their accelerated depreciation will be recaptured today at whatever their present tax rate is. However, --

MR. BERGER: All of it.

MR. UNGER: That's an error. There have been enough years now that it is not all recaptureable.

The remainder of their write-off will be at the capital gain rate. Assuming they were in the 50 percent bracket, they will pay back to Uncle Sam less than Uncle Sam really lent them, with no interest payment during these same years. They have already gotten their investment back.

MR. HAHALYAK: Your Honor, I'm going to object to this turkey --

THE COURT: If you fellows are going to keep doing this, I'm going to call this hearing off.

MR. HAHALYAK: I'm sorry.

THE COURT: That's okay. I appreciate how you feel about it. I expressed that before. But let's don't do it like a fight in a cafe, or something along those lines.

All right.

MR. UNGER: The tax consequences really do not present good cause, in my judgment. But before we go further on the tax consequences for the moment, other than straightening out some representations, I should like to point out to the Court that I've listened for well over an hour to arguments and hearing nothing going to standing. That's why we're here. If they have all these arguments, if Unit, Inc. has been as bad as they say it has and all these other things, there are other forms and other times and other ways to do something. We have a live buyer today. Of course, the order spoke of Unit, Inc., because it was Unit, Inc.'s Chapter XI that we requested the authority to sell. Of course, the order found that it was good for Unit, Inc. Certainly, the Court wouldn't sign an order saying sell, but this is a bad deal for Unit. Of course, the Court thought it was good for Unit; otherwise, he wouldn't have authorized the sale.

Now, whether Unit has the right to sell under the partnership agreement, or whether or not Mr. Hahalyak pays his taxes, it may be something that they and I will never agree until we find a proper court to get a proper ruling. But that is not before this Court. Today I'm submitting they have no standing, and I believe at one time in Mr. Hahalyak's argument he said they have no standing. They have no standing. They have not shown any liability for partnership losses. Yes, they may have some liability to Uncle Sam.

Mr. Hahalyak, I think in response to your question said, if Unit had an automobile accident and there was a half-million-dollar judgment against B & B while it was a B & B business, would any of the limited partners be liable? He said no. That would be a liability for a partnership loss.

THE COURT: I want you to direct your remarks for the moment -- I don't want to cut off anything -- but the point that occurred to me before was that the double position that Unit, Inc. is in: A) they're a partner in this partnership and in a fiduciary capacity to protect the limited partners, which is disastrous in this case, as far as they're concerned. But it's also trying to pull itself out of its own bootstraps, financially, now. Where is the stronger fiduciary? Where is the stronger thing that Unit should do in this case?

MR. UNGER: It is my opinion that they are not breaching any fiduciary duty. I'm prepared, if the Court would like, to put on Mr. --

THE COURT: Well, Unit, Inc. is acting in the face of a practically unanimous decision by the partners, and they don't want this. Well, practically.

MR. UNGER: They would love to, because their interpretation of this deal is that if there are any losses, Unit has to put the money in to keep the deal alive. They don't have any liability, they just get their write-offs, and Unit never has the authority to sell and Unit is --

THE COURT: They don't want to take their tax losses at this point. These are partners in this thing, now, and Unit is representing them and these fellows say, "We don't want this at this point, Unit." And Unit says, "I don't give a damn what you want. I'm going to do it anyway."

MR. UNGER: Well, Judge, if that is an issue, it is not before this Court. They have no standing to be here, they went into this saying only those partners that were liable for losses could vote on a sale. There are no partners liable for losses. They have given up that right. Now, if Unit makes a bad sale, sells for below market, does in any way hurt the market exchange, then they may have a cause of action. But if Unit gets market and gets a fair price, there is no reason why it can't sell, because it now has to put the money up to keep this deal alive. We are, just like this, from becoming another chapter proceeding before this Court.

THE COURT: You mean B & B?

MR. UNGER: Yes. The reason that there isn't any distribution of money is there isn't any cash flow. We're limited from increasing the rent by provisions of the HUD mortgage agreement. We are very lucky to have the offer we have. There hasn't been a long line of people knocking at the door wanting to buy that. Unit has a duty to its creditors, Unit has a duty to these limited partners, Unit has a duty to itself, and it's possible to meet all of those duties by selling for fair market value.

Now, these gentlemen were sophisticated when they went into this, these gentlemen have enjoyed the benefits of the interest-free loan from our government and now these gentlemen say, "I don't want to pay Uncle Sam back." If it's a fair exchange, Unit has not breached any fiduciary duty. It certainly has no fiduciary duty to protect them and infinitum from paying their taxes. I pay taxes and most everybody else does, and I think you'll never find a fiduciary duty to keep your limited partners from paying their taxes, today or any other time. It's a fair price. They stood up here for over an hour, and they didn't address standing. There were a lot of emotional arguments, a lot of attempt to introduce evidence, a lot of attempt to go to the merits, I think a substantial attempt to mislead the Court.

MR. BERGER: We want you to pin where we are seeking to mislead this Court, and I'll pin where you have done it and are doing it.

THE COURT: Let me ask him. I would, again --

MR. HAHALYAK: I'm sorry, Your Honor. I'll not take these statements.

THE COURT: I can excuse it a couple of times, but we're going to stop one of these times and that could be contempt.

Go back to my order again which, as I had it reread to me, it did sound rather broad there. For example, we talk of a finding, this is a fair sale, how do I know that?

MR. UNGER: Well, if you would like some evidence, additional evidence --

THE COURT: How do I know that at the time, is what I'm talking about. You probably stopped --

MR. UNGER: I appeared before Your Honor, and maybe Mr. Morris, and said that it was a price that in his judgment and our judgment was in excess of market value and the reason was that we can't raise the rents, that we have to go through HUD and the bureaucracy, and I happen to have some personal knowledge of the difficulty of getting things approved, and that it was getting very marginal and that this was a fair price, then I may have said, I don't know. I don't know when I knew, but I do know that the purchasers have the ability to refinance, if they wish, that they will not be restrained by the HUD restraints if they wish to go beyond them, but they are in a position that this partnership is not. This partnership can't refinance. I hear --

THE COURT: Through B & B.

MR. UNGER: I hear no offers of anybody saying, "We'll put up enough to meet the HUD mortgage and let's raise the rents." I don't hear anybody offering to make new contributions to the partnership. What I hear is, "I have to pay my taxes."

Now, it's really hard for me to engender a great deal of sympathy because I sat there and I thought, "I guess I know how he feels, but maybe he's walking around with my last quarterly payment in his pocket and not paying interest for it." And, you know, I don't have a lot of sympathy. When I write that check, I cry just like everybody else. But I submit that's not a reason not to let Unit get a fair price and rehabilitate itself. And

Mr. Burnett mentioned in his comments a bond.

THE COURT: A bond?

MR. UNGER: A bond. I believe I heard Mr. Burnett say that maybe if this deal doesn't go through there should be some bonding, we should be protected. I don't think that they're standing, I don't think these people have authority, but if the Court should disagree with me, I would submit to the Court that this could be a substantial damage to Unit in its Chapter XI if they are wrong and if we are right, and I think we are right. And I really think that there should be posted. If the Court doesn't authorize Unit to sell, notwithstanding all these other issues which may be litigated, and probably will be litigated in Lexington, that the Court should require a substantial bond be posted to protect us. What if they are wrong and what if I am right? What if the plain language "liable for the losses of the partnership" means liable for the losses of the partnership? And, Judge, I don't have much doubt that's what it means.

It doesn't mean a fictional write-off under the Internal Revenue Service. It doesn't mean that it's an investment to satisfy SEC requirements back in 1972. It means liable for the losses of the partnership, and they said they're not.

And I think that if they want to halt the sale, anyway, they ought to post a bond that will protect Unit, Inc. It's important to Unit and its rehabilitation that this partnership debt to Unit be paid if there is an offer that's a fair market value for this property and If Unit has the authority under the partnership agreement to sell, and I submit it does.

THE COURT: But I come back to you again, I want to clarify one thing: B & B, it appears to be, at least to the knowledge of this Court, is in no financial difficulties. I don't know.

MR. UNGER: This morning.

THE COURT: I am not officially aware of any.

MR. UNGER: That's right. And it's not making much money either.

THE COURT: Well, I mean, I don't even know that. I don't get any reports from B & B.

MR. UNGER: No, not yet. But that isn't important for you to determine whether Unit's getting a fair price for a good share of this sale. All of these other arguments being made this morning, Judge, are straw men. They really are not before this Court, as I see it, and the Court may disagree with me, and there, therefore they're before the Court. But there is no standing, there is no partner liable for losses, no partner liable for the losses under the agreement that these rather sophisticated people signed. They have no standing. They have no right to object. All that is really before the Court is, is this a fair price for Unit's share and, then, do these people have any standing to object to it. And I submit that it is fair and I'm prepared, if the Court would like, to put additional evidence on the market value. I have Mr. Thornton right here. He is a realtor. He is from Lexington. He is familiar with the project. He is willing to testify.

MR. HAHALYAK: This is an oral argument, Your Honor. We don't have our experts, and we don't think it's relevant.

MR. UNGER: Are you objecting to me again? Are you interrupting again?

MR. HAHALYAK: I'm not interrupting you, sir.

MR. UNGER: Your Honor, I really do find that we're getting --

MR HAHALYAK: I'm objecting.

TEH COURT: As I say, on the basis of the oral argument, no comment at this time.

MR. UNGER: There is a finding right now, there's been no evidence to the contrary, that it is a fair price, Judge. There have been a lot of argument and a lot of straw men thrown up.

THE COURT: Let me put it to you this way. You don't want to hear any testimony about the value of this property at this time.

MR. HAHALYAK: Your Honor, this was an oral argument.

THE COURT: I'm taking it you don't want to do that.

MR. HAHALYAK: That's right. Because this is not a hearing, as Your Honor said earlier.

THE COURT: Okay, I'm merely asking if you want to hear this testimony or not? If you don't, we won't put it on.

MR. BERGER: We don't have our expert here.

THE COURT: That's all right. I just merely asked you. We won't do it then at this particular time.

MR. UNGER: All right. I submit that what we have at the moment before this Court is a finding that it is a fair value. There has been no evidence to show it's not a fair value and I didn't try to present testimony because it is an oral argument. And I will agree we're supposed to go to standing. It sort of roamed a little bit. But

I want to bring it back to standing because that's why we're here. I don't think they have standing. I submit that their objections, if there are objections, and the only real objection I hear is, "We have to pay our taxes," aren't properly before the Court, and I'm fully aware that there may be another form, another piece of litigation somewhere to resolve it. But I'm satisfied that we are right and we should have the ability to go forward. We shouldn't be stopped by somebody coming in stirring up clouds of dust, building straw men, wringing their hands about having to pay their taxes, and Unit be blocked on an attempt to rehabilitate itself with a fair price.

Now, if Unit is selling this under market, if something wrong is in the deal, they have every right to do anything they can to enjoin the sale.

THE COURT: They have every right to do what?

MR. UNGER: To try to enjoin the sale. You know, there are courts in Lexington, Kentucky, real, honest-to-God judges.

THE COURT: That's a nice thing to say in this court.

MR. UNGER: I'll stipulate we have them here. Okay?

With all respect, this Court is not the only Court in the land, though I seem to spend a lot of time before it.

THE COURT: Yes.

MR. UNGER: Maybe Mrs. Kendall won't agree that this is not the only court in the land. I don't know that she's been in any other.

THE COURT: Been here enough.

MR. UNGER: They have all sorts of rights if they think we're wrong. But it shouldn't be here. It shouldn't block the authority for Unit to go forward, if it can. They have no standing. They haven't shown one liability for partnership losses. I keep coming back to the very simple, plain words of the partnership agreement that they signed. I have difficulty, after listening to them and here, here, here, here, there. I thought I'd never hear anything about how they're liable for losses.

THE COURT: It's just difficult for me, as the Court, and as a former lawyer, to conceive that an agreement like this wouldn't have some veto power some place on the action of the general partner in the situation of this type. It's hard for me to swallow that. Really, it is.

MR. UNGER: Do you want a guess, Judge? Would you like my guess?

THE COURT: Yes.

MR. UNGER: I think I have a guess. I think I've figured it out.

THE COURT: What?

MR. UNGER: This -- and yet you'll notice that this is kind of pieced together with two different kind of typewriters --

THE COURT: What's that? You mean the agreement itself?

MR. UNGER: Yes. The Court has noticed that, I'm sure.

THE COURT: Really, I haven't, no.

MR. UNGER: I suggest maybe I'll help them in my guess. If the Court would look at --

MR. HAHALYAK: We have the statement of the preparer as to the meaning of that.

MR. UNGER: Page 5, page 6 and page 7. It looks like it's on different typewriters.

THE COURT: Yes, now that you mention it, it is. I see that now. I wasn't looking for that before when I was reading this, but obviously, it is.

All right. What were you going to say?

MR. UNGER: It looks to me, I'm sorry to say, like a cut and paste job, where somebody said draw an agreement for this deal, and by mistake somebody grabbed the general partnership agreement where there were investors and a guy that had an idea or a guy that had an invention and said, "We'll put our money behind your invention, but we're the guy who's got the money up, we're liable for losses." And this is the general partnership deal where one guy had the money and one guy had the idea in, or one group did. And the guy who's liable for losses wanted the right. And they did a little cut and paste job and they forgot that they were drafting a limited partnership agreement. And it was presumably reviewed by competent counsel, including a number of the investors. And everybody was so eager to get their write-off that they read what they wanted to read. But the real words are "partners," "limited partners liable for losses." That's what I think this is. I wouldn't want to criticize any counsel and this is a guess, but it sure makes sense.

THE COURT: All right.

MR. UNGER: I happen to have a general partnership agreement in my office and I was reviewing it for something else and I saw the phrases.

THE COURT: Saw what?

MR. UNGER: The phrase. The partners are liable for losses, have rights that the partners that aren't liable for losses don't have. And that's what I think happened. But this was stuck with the plain meaning of the words.

Now, there was a time before your investment had been lost on interest payments, building, or whatever expense, it was written off.

THE COURT: During the first few years, you mean?

MR. UNGER: Yes. They might have had different rights, but the plain meaning says they have no standing. And I recognize well that this Court authorizes Unit to go forward. We may or may not be inviting a piece of litigation at the site, but that's where it should properly be. This is a Kentucky partnership. The property is in Kentucky. I think we'll dispose of it rather rapidly.

THE COURT: What do you mean?

MR. UNGER: Any litigation they bring, I think we're prepared to meet. We've been briefing it here, and obviously, the same law will apply. I doubt if they have standing to file, which is the same issue.

Now, I admit it's not the kind of agreement I would run to sign, but I am not representing any of the limited partners, and I didn't when they made the deal. We are stuck with the words to the agreement.

I heard the Court say earlier that he had several questions, and I don't want to miss anything if you --

THE COURT: No. The one question that I did, I think you covered it. I wanted to ask you the position that Unit, Inc. is in in this situation as to fiduciary capacity. And you got your limited partners to whom you represent, screaming, "We don't want this deal." And you said, "Well, you know, I'll go ahead and do it anyway because it will help me." If we have that type of a situation, I wanted to get your advice as to where the strongest layalty lays.

MR. UNGER: Judge, it's my view that they have a fiduciary duty, there are a number of fiduciary duties to the limited partners, but one of them is not to keep the limited partners from paying their taxes. And I don't see how that can be a breach of a fiduciary duty, I really don't. I think if they sold it for less than market --

THE COURT: Well, if I accept this curious phrase in this agreement, you would concede, would you not, just by way of legal repartee that the partners would have something to say about this?

MR. UNGER: Only if you put it in, Judge. They're limited partners. They have no more authority than is given to them by the agreement and they have to be very careful that they don't have too much authority or their general partners. No. There are lots of limited partnerships where the limited partners put their money in, take their losses and stay the hell away from it, so Uncle Sam doesn't come in and say, "You're the general partner, You can't write that off." A number of things happen. Yes, the limited partner in any partnership agreement has no more than is granted to them, and you're very careful not to give them too much.

I don't deny it's a unique phrase, but it's not in there by mistake, it's in there 10 times. And I submit that under the circumstances, when it is in there 10 times and when it can only have one meaning and no one of all their impassioned arguments, and I recognize their feelings, I don't like to pay my taxes, but I pay them.

THE COURT: Yes.

MR. UNGER: I think that we're bound by the plain meaning of the partnership agreement, and if there is to be any further question raised about procedure once Unit has the authority under its Chapter XI to salvage interest, that's all we're saying. You're not giving Unit authority to go ahead and sell its own interest, which if it sells under its interpretation of the partnership agreement, may affect them, but all we're asking this Court is authority to sell. I think they have no standing to object.

THE COURT: All right.

MR. HAHALYAK: Your Honor, could I object to make a few replies?

THE COURT: Does this gentleman want something?

MR. SIMONS: I'm a limited partner. I'd like to say something, if I may.

THE COURT: What's the matter?

MR. SIMONS: I'm a limited partner. I'd like to say something, if I may.

THE COURT: All right, go ahead.

MR. SIMONS: My name is Ralph J. Simons, and I'm a limited partner. I got in this investment --

THE COURT: Where are you from, Mr. Simons?

MR. SIMONS: Pittsburgh, Pennsylvania.

I got into this investment because I was told by the accelerated depreciation value and also that the property was going to be held for a number of years and then sold for capital gain. Well, I find out that unless the property is held 16 years and eight months you lose the accelerated -- 100 percent of the accelerated depreciation. So this sale would eliminate that completely, that benefit. Now, the long term is not going to be any long-term capital gain of any consequence with this sale. So I feel I'm being deprived of everything I put in. I think I called you when I first got my notice.

THE COURT: Were you the gentleman that called me?

MR. SIMONS: Yes. I believe you told me at that time that this order in no way affected the limited partners. This was just a change of the general partner.

THE COURT: You were calling me about something else. You were calling me about the exchange of partnership assets, I think, at that time. I don't think you were calling me about the sale. There was an exchange of partnership assets, as I recall.

MR. SIMONS: No, no, sir.

MR. UNGER: Yes, Your Honor, there was an exchange. At least I think that this is what the Court thought, because the Court told me that somebody called about the exchange between Unit, Inc.'s interest and Scioto Park and R. J. Bloomstein's interest in B & B. That went before the Court, and that exchange was approved and after it was done, His Honor told me that somebody had called and questioned the exchange.

MR. SIMONS: I don't know anything about that.

MR. UNGER: I think what may have happened, if I can suggest it, is that you were talking about apples and His Honor was talking about oranges.

MR. SIMONS: Well, I got the notice from Unit that there was going to be a sale, and that is what I called you about.

THE COURT: I'm glad you expressed yourself here, as I say, because now that you know that --

MR. SIMONS: I haven't had proper notice.

THE COURT: Well, I think you got notice, didn't they? I recalled your question, and I got a different answer. Somebody got notice of this thing. I'm under the impression that we did this thing surreptitiously in some way, shape or form.

MR. SIMONS: We were never notified they were in bankruptcy.

THE COURT: Nobody ever listed you as creditors, I suppose. All the Bankruptcy Court does is, in effect, what the party who comes in asking for relief tells us to do. We don't go out and investigate whether there's creditors in bankruptcy or not. We just -- if they say, "I owe somebody," we put them down." If he says, "I don't owe them," we don't know anything about it.

MR. UNGER: Judge.

THE COURT: Until somebody apprises the Court that we're a creditor in this case, I wouldn't know it. There is no way to know that.

MR. SIMONS: Well, they mentioned that they're getting the best offer they could get.

THE COURT: Unless there is fraud on the part of the bankrupt, then that may eventually result in a criminal indictment in some way, shape or form. But insofar as the Court's responsibility, we only notify people that we know about.

MR. UNGER: Judge, I think that's stretching a little bit. We don't consider them to be creditors of Unit. Unit is a guarantor of B & B, and they have -- not only have they not brought an action against B & B, they haven't even filed a complaint to B & B that they haven't gotten their money. They are not creditors. And Unit would be, if anything, --

THE COURT: This is a Unit, Inc. proceeding. Nobody connected with B & B would get any notice unless they're a creditor of Unit.

MR. HAHALYAK: Your Honor, we're creditors. We are creditors. On their books they show us as creditors.

THE COURT: I don't know anything about that.

MR. HAHALYAK: There is a fraud here. I'd say this openly in court, there's a fraud here.

MR. UNGER: Objection.

MR. HAHALYAK: Your Honor, let me say this. I'd like to answer this. They have a financial statement that shows, specifically, one hundred and some thousand owed to us. They haven't let you know about it so that you could notify us of this proceeding. There is a fraud of the first order.

Secondly, Your Honor, he states that --

MR UNGER: Objection.

THE COURT: What were you going to say?

MR. HAHALYAK: Had we been notified --

MR. UNGER: I really object to Mr. Berger walking around and saying, "Give this to the Judge." I'd like to see what it is we're talking about. This isn't a game. This is a court of law, with rules.

MR. BERGER: We know that.

MR. UNGER: Act like it then, Counsel.

MR. BERGER: I wouldn't try to do something like that, Your Honor. I didn't try to do anything, Your Honor.

MR. UNGER: He gave a piece of paper to Miss Berg and said, "Give it to the Judge."

MR. BERGER: I'll take it back. Here, you can look at it, if you like.

MR. UNGER: First of all, somebody else has the floor.

MR. BERGER: You can get technical, if you like.

THE COURT: Wait a minute. Let's don't call it a matter of technicality. It's a matter of decorum as far as I'm concerned. So let's don't just rely on the word. Let's not say it's a technicality. It's more than that. Did you have anything else?

MR. SIMONS: Yes, I have something more to say. They're mentioning that they're getting the best part they could possibly get, and I'm questioning this, because I think I wrote a letter to them and also a copy to you saying that -- a group of limited partners that may be interested in purchasing it. I never got an answer back. So are they getting the best price they could get?

MR. UNGER: I'll be glad to respond to that.

MR. SIMONS: Also, why does it necessarily have to be sold? Why can't Unit sell its general partnership out and get the money they need to pay their debtors, and not lead us limited partners on.

THE COURT: If you fellows want to get together and buy out Unit, Inc. for what its share of this thing would be, fine.

MR. SIMONS: See, we never had this opportunity.

MR. UNGER: That's not precise, Mr. Simons, because I had several lengthy conversations with Mr. Capitan and Mr. Parker and Mr. Berger before and after the last time we were in court. The last time I talked with Mr. Capitan he was going to talk to every limited partner, he was going to see if they could put together an offer to buy Unit's position out and he was going to call me within two days. I was out of the office one day and he did place a collect call, they didn't take it, I called him back and he's never returned the call since then. It's been some time and I haven't heard from him. I understood that one of the limited partners was surveying all the limited partners.

MR. HAHALYAK: It's obvious, Your Honor, that --

MR. BERGER: May I answer that, because I was there at that telephone call, and there was some talk about buying out the limited partners. And before we had a chance to turn around another motion was served on us.

THE COURT: That's this one, probably.

MR. BERGER: A motion to strike a motion.

THE COURT: Yes, that's this one.

MR. BERGER: What was the use of our going ahead any further on that conversation?

THE COURT: No, no. You're mistaken. That motion was set at my direction to accelerate this hearing.

MR. BERGER: That's quite all right.

THE COURT: And you were given the opportunity, ever since that motion was served, to do something if you wanted to.

MR. BERGER: But, Your Honor, we are a matter of days, we have people all over the place, we can't just call them in just like that.

[illegible]

THE COURT: I don't know who's right and wrong in this thing, but if this gentlemen said he was going to get a hold of all the partners and do --

MR. BERGER: He didn't say that, sir. He said he would try. How could he say --

THE COURT: Well, we're talking in terms of conversation.

MR. UNGER: We were here an awful long time ago.

MR. HAHALYAK: Your Honor, in their -- first of all, let me say they have no status here. We filed a motion to strike their motion. They have no status. They have no status here for one reason: I say Unit, Inc. to sell, for the simple reason they have been notified and have been removed 30 days' notice as general partners. This authority is vested in the limited partners because of the breaches in mismanagement under the partnership agreement. The partnership agreement specifically provides that if the yearly payment is not made, this shall be deemed as conclusive proof, as I recall, of mismanagement. We have notified them of the various --

MR. UNGER: Is this rebuttal?

MR. HAHALYAK: Yes. I'm saying you have no capacity. In answer to their statement that we have no capacity, what we're saying to Your Honor is that Unit, Inc. is no longer the general partner. They have been so notified. They have no status here at this time under the partnership agreement because of the mismanagement of a substantial nature. they have been removed effective 30 days. Any act by them, as we have told them, is a derogation of the rights vested in them. This has been divested and it is authorized under the partnership agreement. I bring Your Honor's attention to this fact because it is crucial. Your Honor, they have in their financial statements stated at December 31, 1979 the general partner is in default on guaranteed payments, that is to the limited partners, for all years through '78, totaling $139,810. They never told you about that. We were never notified of this proceeding. We had been a creditor here, and we have seen to it that there was a plan that was proper.

MR. UNGER: Could he help the record, Mr. Hahalyak, could you say who "they" is? I didn't say "off the record." Would you help the record by saying who "they" is so --

MR. HAHALYAK: "They" is the audited financial statements and other confidential information that B & B Properties are a limited partnership and this is derived from Unit, Inc.'s records and from Unit, Inc.

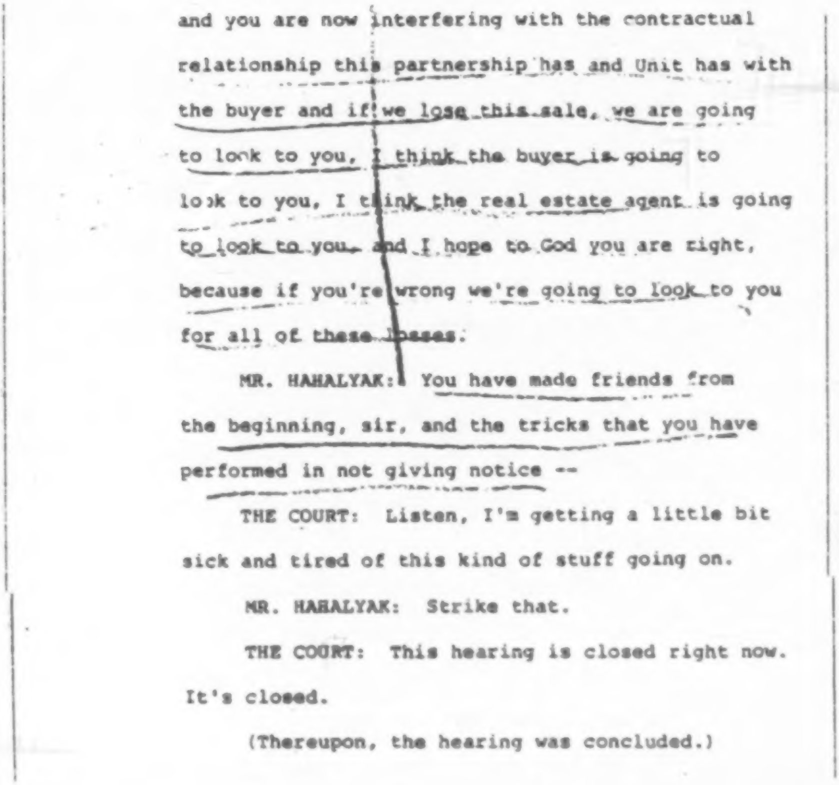
MR. UNGER: Thank you.

MR. HAHALYAK: Now, Unit, Inc., absolutely, and if they deny this, I want to know it, knew of the liabilities of the debt that they owed the limited partners. I ask him now in open court in order to knock out the fraud that I'm alleging here why didn't you notify us?

MR. UNGER: Do you want me to take the stand? Do you want to swear me?

MR. HAHALYAK: I want to know the answer to that. Why didn't you notify the limited partners?

MR. UNGER: Mr. Hahalyak, I'll give you an answer. You file your action in the proper form,



and you are now interfering with the contractual relationship this partnership has and Unit has with the buyer and if we lose this sale, we are going to look to you, I think the buyer is going to look to you, I think the real estate agent is going to look to you, and I hope to God you are right, because if you're wrong we're going to look to you for all of these losses.

MR. HAHALYAK: You have made friends from the beginning, sir, and the tricks that you have performed in not giving notice --

THE COURT: Listen, I'm getting a little bit sick and tired of this kind of stuff going on.

MR. HAHALYAK: Strike that.

THE COURT: This hearing is closed right now. It's closed.

(Thereupon, the hearing was concluded.)

Senator SPECTER. Let me finish, Mr. Hahalyak. I think I can make your contention. You can supplement it. You raise the point on page 29 of the transcript about the absence. You say, "Now, let me say we have also made an objection because there has not been procedural due process."

There is one exchange here that I do want to focus on, but before I do, Mr. Hahalyak, I would like your contention as to how you characterize, if you do, Mr. Unger's improper conduct? What is your contention?

Mr. HAHALYAK. Well, let me do it this way. Instead of trying to give you a characterization, let me go back to June 26 when I wrote a letter when I got first notice of this. This will give a true——

Senator SPECTER. Well, let me focus on my question. You can supplement it. Do you contend that there was fraud here or a crime?

Mr. HAHALYAK. Let me say this. Fraud is a difficult thing to prove. I honestly believe the conduct was fraudulent. I honestly believe that there is enough here to show, No. 1, that Mr. Unger knew what the law was or else he certainly had no right to the position that he had, and if he knew what the law was, and not only that, we brought the law to his attention, particularly the Uniform Limited Partnership Act which specifically states you need the consent of all, he disregarded that entirely and he did it through the procedure of rushing something through without due notice, without procedural due process, and in effect, taking away the property of another, arbitrarily and without due process.

Senator SPECTER. Well, you have made the allegations in this transcript, Mr. Hahalyak, on page 36 about fraud and on page 49 about criminal activity.

Mr. HAHALYAK. Right.

Senator SPECTER. This is your statement at page 49. "Your Honor, there is criminal liability here." What is the factual basis for that assertion?

Mr. HAHALYAK. The factual basis would be this. No. 1, the property that was involved, Patchen Place, was owned by B&B Properties. B&B Properties was not in bankruptcy. Mr. Unger maneuvered the sale of B&B Properties which was not in bankruptcy and knowingly did it without the consent of the limited partners, and in this sense, it was a fraud of the first order; in this sense, it was a conversion of property that never belonged to him or to his client, and if we look at the nature of this maneuver, one must conclude that he knew what was going on and he was trying to outmaneuver and see to it that the end result that he wanted would be accomplished, regardless of what the means were and regardless of the fact that he had no right to do it.

On June 26 when I received that letter, when I received notice of the alleged sale, I wrote a letter to Judge Gartner saying "I am a limited partner in B&B Properties. I received yesterday, June 25, 1980, the order authorizing sale of the assets of B&B Properties. In this order, I am informed that I must notify you prior to June 30, 1980, if I seek to withhold consent to the sale referred to in the order. This is the first notice that I have of any bankruptcy or sale. I cannot understand the highly arbitrary time limit set and the self-serving nature of the order. I wish to state categorically that I am deeply opposed to the sale and to the total lack of procedural due process in this entire proceeding."

Senator SPECTER. Mr. Hahalyak, how did you receive notice that you had the 5 days to object?

Mr. HAHALYAK. In the order of June 19.

Mr. BERGER. Just a copy of the order.

Mr. HAHALYAK. All we got was this letter with a copy of the order.

Senator HATCH. June 19 of what year?

Mr. HAHALYAK. 1980. Incidentally, in answer to your prior question, you said what steps did we take. We filed a petition for reconsideration and vacation of that order. I have that petition here.

And in that petition, we go through the enumerable reasons why this sale was invalid. Any person who had any simple knowledge of the law would understand that what had transpired was wrong, and we list the reasons. We said, "(a) B&B Properties is not in bankruptcy, only the general partner Unit, Inc."—you cannot handle property that is outside of the bankruptcy.

Senator SPECTER. Who sent you this order? Did Mr. Unger send you this order?

Mr. HAHALYAK. Either Mr. Unger or Mr. Morris. The letter that was sent indicated that it came from the court, because at the end we have the U.S. Bankruptcy Court written below the signature of Mr. Morris. It is a very confusing type of letter.

Senator **Specter**. So you are not sure who sent you the order.

Mr. **Hahalyak**. I do not know who sent it.

Senator **Specter**. I have one final question for Mr. Berger.

Mr. Berger, I had asked you about whether you made any objection to the ex parte communication, and I think it important to note that, as it appears at page 21 of the record, you say, "Now, in this order, and I wish Your Honor to know that I am not criticizing anything that has happened in this court."

And the court says, "You do not have to worry about that." Was that your positions?

Mr. **Berger**. I probably, to the best of my recollection, it would be that I did not want to show that it was the court's fault that this was ex parte. I did not try to blame the court, because I felt it was the parties involved that were trying to put this thing over on us rather than the court. I was not going to go and malign the court at that particular time. I did not have enough reason to.

Senator **Metzenbaum**. May I ask a question, Mr. Chairman?

Senator **Hatch**. Yes, sir, Senator Metzenbaum.

Senator **Metzenbaum**. I came in late because I was at another meeting, but I want to be certain I understand the thrust of your testimony.

Mr. **Berger**. I would like to have the opportunity of presenting a copy of the allocation of proceeds of sale that I talked about. It has the arithmetic here.

Senator **Hatch**. Without objection, we will place that in the record.

[Material follows:]

ALLOCATION OF PROCEEDS OF SALE UNDER COURT ORDER OF JUNE 19, 1980

Sale Price		$5,300,000
To B & B Properties		
Cash at closing (NOTE 1) (minus closing costs & fees (?) - Real Estate Commission & Atty. fees)	$1,000,000	
To B & B Properties (NOTE 2) (to be used for payment of balance of Note plus 10% interest	675,000	
To Limited Partners (NOTE 3)	100,000	
Mortgage Balance to be assumed	3,525,000	
		$5,300,000

* * * * * * *

(NOTE 1) Unit will receive $1,000,000 at closing and will apply $500,000 as partial payment on "note" of $800,000, which Unit as General Partner gave to itself as Unit, Inc., as contractor, for alleged "overruns" on Patchen Place construction--no audited statement accepted or approved by Limited Partners. This note was made payable at expiration of term of Limited Partnership--2021 A.D.--without interest. Present value approximately $50,000--but being paid in cash in 1980 under this Order of Court(?)

(NOTE 2) Balance of $300,000 alleged to be due on above $800,000 Note to be paid from proceeds of $675,000 Note above.

(NOTE 3) Total amount to be paid to Limited Partners--$100,000. However, Unit Inc. and Blum together had 25% Limited Partners shares and would receive $25,000 from the $100,000 payable to Limited Partners. This leaves $75,000 to be paid to all other Limited Partners who had invested $564,000 in cash in the project and had received nothing for eight years from the operation. They would also lose their valuable investment in B & B Properties, after B & B's mortgage had been substantially decreased (original mortgage $3,918,600) and their property substantially increased in market value. Furthermore, Unit has not paid and still owes the Limited Partners payments of $27,962 per year for five years (total $149,820) which it guaranteed to pay the Limited Partners in the Amended Partnership Agreement, page 10; and also the unauthorized compensation fees deducted and retained by the General Partner, approximately $500,000 by estimate, which payments are expressly prohibited in the Partnership Agreement, page 15.

COMMENT: These are some of the items included in the Order of Court of June 19, 1980, based on the Land Contract which the Order states is "in the best interest of B & B Properties" and "Therefore, absent the most extraordinary reasons, it would be unreasonable for any Limited Partner of B & B Properties to withhold consent for this sale."

* * * * * * *

QUAERE: Could anyone believe that a Court could make such an Order, and if not the Court, who?

Mr. **Berger**. And I also wanted to say in answer to the chairman's question, I think you asked me was it $70,000 that much involved. Your Honor, here was a valuable piece of property.

Senator **Hatch**. We understand that.

Mr. **Berger**. Far beyond the $70,000.

Senator **Hatch**. I just wanted to know what your initial investment was and how it was split. It may have been worth much more. I do not know. I will take your word on that.

Mr. **Berger**. I will say this. If I were out representing a client, it would make no more difference.

Senator **Hatch**. I understand.

Mr. **Berger**. I am saying what I feel.

Senator **Hatch**. Yes, but do not read into the questions. We are not making any value judgments with regard to what you have said here.

Go ahead, Senator Metzenbaum.

Senator **Metzenbaum**. I just want to be certain that I understand the thrust of your testimony. You men were lawyers for, and were partners in, a partnership called B&B Properties. B&B was an investor or part owner of Unit, Inc., that was in bankruptcy.

Mr. **Berger**. No, sir. May I explain that, Senator Metzenbaum. B&B was a limited partnership, and it had limited partners and a general partner. Unit, Inc., was the general partner.

It so happened that Unit, Inc., also was a limited partner, and another man by the name of Blum was a special limited partner. Those together owned 25 percent of the limited partnership. That limited partnership, however, did not mean they owned any part of any property, because it is the same as a partnership. A partner does not own a property. The partnership owns the property, but they have shares in the partnership.

Senator **Metzenbaum**. I am just trying to get this clear. Now, B&B is a limited partner?

Mr. **Berger**. Ship. B&B is a limited partnership. It is the entity.

Senator **Metzenbaum**. I understand. And Unit, Inc., is what in that situation?

Mr. **Berger**. Unit, Inc., is the general partner which is entrusted by the Partnership Act to operate and manage the partnership property.

Senator **Metzenbaum**. And Unit, Inc., was in bankruptcy?

Mr. **Berger**. Unit, Inc., went into bankruptcy and Unit, Inc., could have sold its 12.5 percent. They had a right to do that. But Unit, Inc., did not have the right to sell the whole company.

Senator **Metzenbaum**. Just let me ask the questions.

Then you get an ex parte order in the Unit, Inc., proceeding that requires B&B's property to be sold, is that correct?

Mr. **Berger**. I do not know whether I understand you.

Mr. **Hahalyak**. Yes.

Senator **Metzenbaum**. Let me ask this gentlemen. I gather you are partners, is that it?

Mr. **Hahalyak**. Yes.

Senator HATCH. They were limited partners in this limited partnership. They practice law separately.

Senator METZENBAUM. All right. What I am trying to find out is am I correct in my understanding as to the ex parte order having to do with the B&B Property, is that correct?

Mr. HAHALYAK. That is correct.

Senator METZENBAUM. And then on your motion to vacate, were you successful?

Mr. HAHALYAK. We filed the motion to vacate. Ne wanted a hearing on it so we could go into the full facts. Mr. Unger withdrew his application so that the hearing could never be held. He said that the buyer was filing an action for specific performance in Kentucky, and he asked that the entire matter be dropped because of the proceeding in Kentucky.

We were opposed to that. We felt the law was so clear. This was just another maneuver to shift it over. Incidentally, the person that bought that was in court at this hearing and said that he would only, that is the first hearing on June 30, and said that he would only buy the property if this thing would go through within the next 10 days.

If this thing was not cleared in the court within 10 days, he said, in his opinion, they would never go through. It was through. It was the end of it. Three years later, they go into court for specific performance. They were persistently moving for this property. They knew there would be a tremendous profit, particularly since they intended to convert this into condominiums. They had already prepared the literature, as I understand it for the condominiums.

Senator METZENBAUM. I do not see that that is particularly relevant. It seems to me that the part that is relevant has to do with whether or not there was an effort made to sell B&B's Property in a proceeding in which B&B was not involved without the owners being notified except on an ex parte basis. It seems to me that is the issue, or am I missing it?

Mr. HAHALYAK. That is the issue and we raised that issue, Senator Metzenbaum, in our pleadings. Let me just read this and I think it summarizes everything:

> B&B Properties, a partnership, is not in bankruptcy. Only the general partner, Unit, Inc., is in bankruptcy. The said partnership is a Kentucky partnership.

Plus it was not even in Ohio, the property; it was in Kentucky, another State.

> (b) None of the limited partners is a resident of the state of Ohio. (c) The sole assets of the partnership is located solely in Kentucky. (d) None of the limited partners was ever duly served as partner or notified of the within proceeding by any pleading. (e) The only notice the partners received of the within proceeding was an ex parte order of court without advance notice or presentation authorizing the sale of the assets of B&B Properties issued solely at the request of the general partner with five days notice to act on said order prior to the sale of the partnership property. The said proceeding lacked due process. Petitioners were not given notice or an opportunity for a full and fair hearing. The said order is in direct violation of the terms and provisions of the partnership agreement. The said order, if carried out, would have deprived the limited partners of their property without due process of law.

Senator METZENBAUM. I think I have the point.

Mr. HAHALYAK. We went into all of it so that they were aware of it.

Senator METZENBAUM. Thank you.

Senator HATCH. Thank you, gentlemen, for being here. We are happy to have had your testimony. If you have any documents you care to submit, we will put them in the record at this time.

Mr. BERGER. Thank you.

[Documents follow:]

June 26, 1980

Hon. Leonard C. Gartner
U. S. Bankruptcy Court
Southern District of Ohio
Western Division
735 U. S. Post Office & Courthouse
Cincinnati, Ohio 45202

Re: Unit, Inc., Debtor
No. B-1-75-1989

Dear Judge Gartner:

I am a limited partner in B & B Properties. I received yesterday, June 25, 1980, the order authorizing sale of the assets of B & B Properties. In this order I am informed that I must notify you prior to June 30, 1980, if I seek to withhold consent to the sale referred to in the order.

This is the first notice that I have of any bankruptcy or sale. I cannot understand the highly aribtrary time limit set and the self-serving nature of the order.

I wish to state categorically that I am deeply opposed to the sale and to the total lack of procedural due process in this entire proceeding. I am informed by all of the partners that had called me, that they, likewise, are deeply opposed to the sale.

Would you therefore please hold up all proceedings until due notice has been given and a proper hearing held on the merits of this case and on the matter pending before the court. It appears that the limited partners not only oppose the sale, but appear to be interested in protecting their interest by purchasing the interest of the general partner upon terms equal to or better than that proposed in the order.

Your kind consideration and immediate reply affording a fair and reasonable opportunity to be heard is requested and will be deeply appreciated.

Very truly yours,

Michael Hahalyak

dlc

cc: B. W. Morris
Unit, Inc.
1055 St. Paul Place
Cincinnati, Ohio 45202

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN THE MATTER OF:) NO. B-1-75-1989
)
UNIT, INC.,) IN PROCEEDINGS FOR
) AN ARRANGEMENT
Debtor.) UNDER CHAPTER XI

PETITION FOR RECONSIDERATION AND VACATION OF ORDER

TO THE HONORABLE LEONARD C. GARTNER, BANKRUPTCY JUDGE

Petitioners S. David Litman, Roslyn M. Litman, Calvin J. Hodder, Ralph J. Simons, Michael Hahalyak, Edward W. Jew, Jr., Joseph M. Behun, R. Heath Larry, Fernand N. Parent, Robert C. Pearlman, Berger & Capetan (Berger & Kapetan), Allen J. Saks, William E. Reisinger, Elizabeth S. Reisinger, Robert J. Wise and Bert James, by their attorneys, Berger Kapetan Malakoff & Meyers, P.C., by Morris M. Berger, Esquire, and Michael Hahalyak, Esquire, respectfully represent:

1. Petitioners S. David Litman, Roslyn M. Litman, Calvin J Hodder, Ralph J. Simons, Michael Hahalyak, Edward W. Jew, Jr., Joseph M. Behun, R. Heath Larry, Fernand N. Parent, Robert C. Pearlman, Berger & Capetan (Berger & Kapetan), Allen J. Saks, William E. Reisinger, Elizabeth S. Reisinger, Robert J. Wise and Bert James are Limited Partners of B&B Properties, a Kentucky limited partnership.

2. Unit, Inc., a Texas corporation, was the General Partner of B&B Properties. The sole asset of the partnership is the property, hereinafter referred to as "Patchen Place", more fully described in the pleadings filed in this proceeding.

3. B. W. Morris is the managing agent of Unit, Inc.

4. On information received from counsel for Unit, Inc., Petitioners believe and therefore aver that the said Unit, Inc.

has acquired the entire interest in said partnership of Robert J. Blum, the Special Partner.

5. Petitioners herein enter a special or limited appearance in this proceeding for the purpose of raising the question of jurisdiction or power of this Court over the subject matter and over the persons of the Limited Partners and aver in support thereof as follows:

a) B&B Properties, a partnership, is not in bankruptcy. Only the general partner Unit, Inc. is in bankruptcy. The said partnership is a Kentucky partnership.

b) None of the Limited Partners is a resident of the State of Ohio.

c) The sole asset of the partnership is located solely in Lexington, Kentucky.

d) None of the Limited Partners was ever duly served as partner or notified of the within proceeding by any pleading.

e) The only notice the partners received of the within proceeding was an ex parte Order of Court without advance notice or presentation authorizing the sale of the assets of B&B Properties, issued solely at the request of the General Partner with five days' notice to act on said Order prior to the sale of the partnership property.

6. In the alternative and without waiving any of the jurisdictional and due process objections raised by special or limited appearance set forth hereinabove, Petitioners aver as follows:

a) The said proceeding lacked procedural due process. Petitioners were not given notice or an opportunity for a full and fair hearing.

b) The said Order is in direct violation of the terms and provisions of the Partnership Agreement.

c) The said Order if carried out would have deprived the Limited Partners of their property without due process of law.

d) In obtaining said Order of Court and in proceeding in the arbitrary and illegal manner, Unit, Inc. breached the terms of the Partnership Agreement and its fiduciary duty owed to Petitioners and by reason of said diverse breaches Unit, Inc. lacks capacity to act on behalf of said Partnership. In addition it is averred that Unit, Inc. has been notified by the Limited Partners of its discharge as General Partner.

e) In obtaining said Order, Unit, Inc. created a conflict of interest which deprived Unit, Inc. of its right to act on behalf of the Partnership.

f) In obtaining said Order, Unit, Inc. unlawfully and illegally sought to appropriate Partnership property to its benefit and to the great detriment of Petitioners' interest in said property, all in violation of the Partnership Agreement and of the duties owed the General Partner to the Limited Partners.

g) In obtaining said Order, the General Partner sought to deprive Petitioners of their rights and property under the Partnership Agreement. By said Order, the General Partner assumed duties and rights beyond the scope of its power and duties delegated to it under the Partnership Agreement.

h) By reason of the act of bankruptcy, the General Partner made itself subject to automatic removal of its right to exist as General Partner and, therefore, powerless to act in behalf of the Limited Partners in any manner and especially in the attempted sale of the assets of the partnership.

i) The Court, bound by the terms of the Partnership Agreement, exceeded the powers conferred on Unit, Inc. in the Partnership Agreement.

j) The General Partner, Unit, Inc., by reason of its acts is no longer the General Partner and cannot act on behalf of the Partnership. The General Partner, therefore, had no power to obtain an Order of Court to act on behalf of the Limited Partners. The above action seeks to unjustly enrich the General Partner at the expense of the Limited Partners.

j) Petitioners reserve the right to add additional reasons after completion of discovery and accounting.

WHEREFORE, the Limited Partners herein respectfully request that this Honorable Court reconsider its Order aforesaid and after due consideration to vacate said Order in accordance with the facts.

BERGER KAPETAN MALAKOFF & MEYERS, P.C.

By Morris M. Berger

MICHAEL HAHALYAK

Senator Hatch. At this time, we will call Oakley Hunter.

And, Senator Metzenbaum, you have asked Mr. Hunter to come.

Senator Metzenbaum. Yes.

Senator Hatch. He is prepared to answer your questions.

And I will swear him in as a witness at this time.

Mr. Hunter, if you will raise your right arm.

Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth so help you God?

Mr. Hunter. I do.

Senator Hatch. Thank you so much. Welcome to the committee.

Senator Metzenbaum.

TESTIMONY OF OAKLEY HUNTER, FORMER CHAIRMAN, PRESIDENT AND CHIEF EXECUTIVE OFFICER, FEDERAL NATIONAL MORTGAGE ASSOCIATION

Senator Metzenbaum. Mr. Hunter, I appreciate your being with us this afternoon. Would you state your name and your address and what you do?

Mr. Hunter. My name is Oakley Hunter, and I reside in Potomac, Md. I was president of Federal National Mortgage Association from January 1970, subsequently chairman and president until my retirement in May 1981.

Senator Metzenbaum. When Mr. Van Dusen testified, he stated the following:

> Now, after the board had been chosen, Mr. Unger advised Oakley Hunter, the president of Fanny Mae, that he, Mr. Unger, would like to be the Chairman of the Board of Fanny Mae. Mr. Hunter indicated to Mr. Unger that because Fanny Mae had just gone private and because Mr. Hunter wanted to establish Fanny Mae's credibility and stature in the private financial community, he thought it was important that Fanny Mae have as its chairman not someone who was in government as Mr. Unger was but a distinguished private citizen, and Mr. Hunter indicated to Mr. Unger that he had selected General Lucius Clay, a man of distinguished background, who was then a partner in Lehman Brothers to serve as the chairman. Nevertheless, Mr. Unger persisted in his interest and desire to be chosen as the chairman. Secretary Romney became involved and concurred with Mr. Hunter in the choice of General Clay as chairman of Fanny Mae and General Clay was then selected."

Would you be good enough to tell us the facts as you recollect them in connection with that matter?

Mr. Hunter. Well, I would say that Mr. Van Dusen's statement as you have read it is substantially correct. I did not select General Clay. In my capacity as the first president, following FNMA's transition to quasi-private, quasi-Government entity, I went about investigating candidates for chairman, and as a result of my investigation, it was my conclusion that General Clay would be the best candidate, and I made that recommendation to the board.

And when Mr. Unger indicated to me that he would like to serve as chairman, I told him that I had committed myself to General Clay and that I would support him. As it turned out, the board did elect General Clay, and HUD Secretary Romney made an appearance and indicated his support of General Clay and that the President of the United States concurred.

Senator Metzenbaum. Did Mr. Unger make any further efforts on his part to obtain the job after you indicated to him that you felt that Gen. Lucius Clay would be a person most appropriate for the position?

Mr. HUNTER. Well, he carried on a campaign for the job, and sought the support of the board. He also sought support outside. He sought the support of the White House. He had people within the White House that he knew and on which he was friendly terms. I would say he carried on a campaign much the same as you carry on a political campaign.

Senator METZENBAUM. Do you recollect whether or not he raised the issue of conflict of interest in connection with Gen. Lucius Clay?

Mr. HUNTER. Well, the matter of a conflict of interest came up after General Clay was elected chairman. The transition to private status was completed in connection with the annual shareholders meeting in May 1970, and the organizational meeting of the new board which, at that time, was composed of 10 elected by the shareholders and 5 appointed by the President of the United States.

And at that meeting, General Clay was elected. Then at a following meeting, Mr. Unger, who was an appointee of the President on the board of directors, presented to the board an opinion of the assistant general counsel of the Civil Service Commission to the effect that General Clay, and other board members—I cannot recall the exact ones—but particularly General Clay, had a conflict of interest and therefore were not eligible to serve on the board.

As I recall, Mr. Unger handed the opinion to our general counsel, Mr. James Murray, who in turn handed it over to me. I conferred with General Clay, and we decided at that point that we would refer it to the Attorney General, which we did.

Senator METZENBAUM. Do you recollect who it was that raised the issue of conflict of interest in the first instance?

Mr. HUNTER. The first I ever heard about it was when the opinion was presented to us at the board meeting.

Senator METZENBAUM. Mr. Unger wrote a letter on June 9, 1970, to Carl Ruediger, assistant general counsel of the Civil Service Commission, in which he stated the following:

> DEAR MR. RUEDIGER: This will confirm our telephone conversation of the instant date in which I advised that Mr. Charles Lant, whom President Nixon recently appointed as a member of the Board of Directors of the Federal National Mortgage Association, had asked my opinion concerning his conflict of interest problems, if any. I understand from the attached proxy statement that Mr. Lant is president of the Cameron Brown Co. of Raleigh, N.C. While Mr. Lant individually owns no shares of Fanny Mae stock, Cameron Brown Co. does own 6,989 shares of such stock and in addition this company is among the 900 companies that service Fanny Mae home mortgages. I am advised that they service under uniform contract terms which apply to all other servicers and that during 1969 this corporation was paid as servicing fees $273,931.

Do you have any recollection of Mr. Lant having raised this issue?

Mr. HUNTER. No, he did not raise it with me. I was not aware of this letter. As I say, my only knowledge of the opinion as to conflict of interest which was written by Mr. Ruediger was when it was presented to the board.

Mr. Lant, of course, is now deceased, but he never raised the question with me, General Clay, or Mr. Murray, to my knowledge.

As I say, I was not aware of the letter and I was not aware of any conversation between Mr. Lant and Mr. Unger, but then that could have taken place without my knowledge.

Senator **Metzenbaum**. Let me ask you. For how long a period did Mr. Unger work with you when you were head of Fanny Mae?

Mr. **Hunter**. Well, from the time of my appointment in January 1970 until the time that he left the board which was sometime subsequent to May 1970 but in the same year.

Senator **Metzenbaum**. Did you come to know him and do you have an opinion concerning him with reference to your relationship with him as pertains to his qualifications to be a circuit court of appeals judge?

Mr. **Hunter**. Well, I cannot pass on his qualifications as a lawyer because I have never really known him in that capacity. I knew him as a fellow director. I knew him as the general counsel of the Department of Housing, but I was not in a position to observe his work as a lawyer.

My difference of opinion with him I guess you would have to categorize as being within the realm of politics, and in the realm of politics I would say that Mr. Unger regarded politics as a game, as a contest, sometimes with no holds barred. However, I would not say that he is alone in that perception.

As it turned out, he came in second best. But I am not in a position to pass upon his qualifications as a judge.

Senator **Metzenbaum**. Do you have an opinion with respect to his character?

Mr. **Hunter**. I would say that he is a tough adversary. I regard him as very intelligent, very resourceful individual. I did not approve of his tactics, but as I say, I accepted them for what they were, and the contest ended as it did.

Senator **Metzenbaum**. I have no further questions.

Senator **Hatch**. Do you have any questions, Senator Specter?

Senator **Specter**. I do not.

Senator **Hatch**. Thank you, Mr. Hunter. We are sorry you had to wait so long to testify, but we appreciate having you here today.

Mr. **Hunter**. Thank you.

Senator **Hatch**. Senator Specter has invited Bonita Buerk to testify. So Ms. Buerk, if we could have you testify at this time, we would appreciate it. Raise your right hand please.

Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth so help you God?

Ms. **Buerk**. I do.

Senator **Hatch**. Thank you.

Would you introduce yourself?

Mr. **Goering**. Mr. Chairman, I am Robert A. Goering. I am attorney for Ms. Buerk.

Senator **Hatch**. Fine.

Let us turn the proceeding over to Senator Specter.

[Letter from Allan Oakley Hunter that was subsequently sent to Senator Hatch follows:]

ALLAN OAKLEY HUNTER
10810 Deep Glen Drive
Potomac, Maryland 20854

October 31, 1983

The Honorable Orrin Hatch
United States Senator
Russell Senate Office Building
Washington, DC 20510

Dear Senator Hatch:

I am writing with regard to the Senate Judiaciary Committee confirmation hearing on the nomination of Mr. Sherman Unger for a federal judicial post. I attended the hearing on Thursday, October 23rd last at which you presided. I had been requested to appear as a witness and answered questions asked of me by Senator Metzenbaum concerning Mr. Unger's efforts to become Chairman of the Federal National Mortgage Association. I had no prepared statement.

I stayed on and listened to the proceedings until adjournment. I respectfully request the Committee to include this letter as an extension of my oral remarks, which were confined to answering the questions addressed to me.

I was named President and Chief Executive Officer of FNMA in January, 1970. From 1971 through 1980 I served as Chairman in addition to President and CEO, and in 1981 until my retirement that year I served as Chairman and CEO. I am a former member of Congress (Republican) from California and a former General Counsel of the Housing and Home Finance Agency, the predecessor of the Department of Housing and Urban Development. When I have not been in Washington, I have been engaged in private law practice in California. I am a member of the California, Federal and American Bar Associations.

I came away from the hearing of last Thursday (which was my only exposure to the case) with an uncomfortable feeling. It was my impression that the animus expressed against Mr. Unger far outweighed the actual evidence introduced against him. It seemed that the lawyers who voiced their complaints (which bordered on apoplexy) were more upset about what happened to their investment in the housing project in question than they were about matters of notice or ex parte actions. I observed no documented evidence of fraud or undue enrichment of Mr. Unger or of any disciplinary action considered or taken against him. With respect to federal income taxes, the case against Mr. Unger appeared to rest on the fact that as a result of audit he was required to pay more taxes and in one instance a negligence penalty.

My point in writing is not to give an opinion as to the weight of the evidence, but to be of possible help to the Committee in understanding why people get so exorcised over Mr. Unger.

My only professional and business dealings with Sherman Unger occurred while we were members of the Board of Directors of FNMA. Pursuant to the Housing Act of 1968, FNMA was spun off from the government. The transition was completed in May 1970 with the election of ten directors by the stockholders and the appointment of five directors by the President of the United States. I had previously proposed General Lucius Clay as the first Chairman because I believed the corporation needed a person in that position who came from the private sector and who was nationally known and respected. Lucius Clay was one of President Eisenhower's top generals in World War II, was in command in Germany at the time of the Berlin air lift, later served as chairman of Continental Can Co., and in 1970 was a managing partner of Lehman Brothers, the New York investment banking firm. Mr. Unger, who had been appointed an interim director, wanted the Chairman's job and campaigned strenuously and tirelessly for it, calling on all his contacts and allies from the 1968 Presidential campaign as well as every other resource available to him. I strongly opposed his candidacy, and in the end prevailed. The Board elected General Clay. HUD Secretary George Romney appeared at the Board meeting and spoke in his favor. However, the story did not end there.

At a subsequent Board meeting, Mr. Unger (who was now a director by Presidential appointment) presented an opinion written by the assistant General Counsel of the Civil Service Commission holding that General Clay and certain other directors had conflicts of interest and therefore were disqualified to serve. I immediately submitted the opinion to the United States Attorney General who over ruled it. Soon thereafter Mr. Unger left his position with HUD and went off the FNMA Board. Mr. Richard Van Dusen, then Under Secretary of HUD, has testified that he was required to leave by Secretary Romney and President Nixon. I shed no tears on his departure. In fact I had no desire whatsoever to have him on the FNMA Board. Since then, our paths have crossed from time to time in the company of mutual friends who I might add, have always stood by him.

It does not surprise me that Sherman Unger has incurred the wrath and disapproval of a number of people who have dealt with him. That was certainly true in my case. Yet I cannot in all honesty years after the fact consider him unfit for judicial office because of his bid for the FNMA chairmanship. His effort to deal General Clay out of the game on a conflict on interest charge was abhorent to me. But then the Civil Service Commission General Counsel's opinion was not a unique experience. HUD Secretary Patricia Harris at a later time retained outside counsel at government expense to write a brief in support of my removal from office for cause. Once again, the Attorney General rendered a contrary opinion, and I eventually retired voluntarily and at a time of my own choosing.

Although not regarded as a team player by his superiors in the 70s, Mr. Hunger is apparently so regarded in the 80s. Secretary of Commerce Baldridge for whom he now works is supporting him. The fact that he has been nominated means that he has been cleared by the Department of Justice, including the FBI. It would be unfortunate if in order to be considered favorably for judicial appointment, one must never have made waves or incurred the ill will of an adversary or associate. As I reflect on my own career in the practice of law I can recall colleagues, admittedly intelligent and resourceful, who in their younger years were regarded by some among their peers as being abrasive, overly zealous and too shrewed for their own good, but who later became able, perceptive and fair minded jurists--far above the average. Sherman Unger could be such a person.

Sincerely,

Oakley Hunter

Allan Oakley Hunter

TESTIMONY OF BONITA BUERK, SECRETARY, FEDERAL BANKRUPTCY COURT, ACCOMPANIED BY ROBERT A. GOERING, LEGAL COUNSEL, WILKE & GOERING, CINCINNATI, OHIO

Senator SPECTER. Thank you, very much, Mr. Chairman.

Ms. Buerk, we very much appreciate you taking the time to appear here, and I know you understand that the occasion for the request arises from the affidavits which you have submitted.

The first affidavit recites that for 21 years—do you have a copy of the affidavit?

Mr. GOERING. Yes, we do.

Senator SPECTER. The affidavit recites that you served as deputy clerk of the bankruptcy court and as secretary to the late Judge Leonard Gartner. How long a period of time did you serve as secretary to Judge Gartner?

Ms. BUERK. I was appointed in 1968, July 1968, as his secretary.

Senator SPECTER. Did you serve with him until his death?

Ms. BUERK. Yes, sir.

Senator SPECTER. When did he die?

Ms. BUERK. May 31, 1982.

Senator SPECTER. So you served for 13 years with Judge Gartner?

Ms. BUERK. Yes, sir.

Senator SPECTER. And you say in your affidavit that you became familiar with Judge Gartner's method of conducting and handling matters, and you say in paragraph 4, quote:

> It was Judge Gartner's practice to summon an attorney or trustee to his chambers in order to discuss with that individual any situation or problem which the judge felt needed explanation or clarification. ——

In paragraph 5, you say: "On occasion, Judge Gartner would telephone an attorney and hold such discussions by telephone."

In paragraph 6, you say that the subject matter of these conferences varied, but that such conferences were normally precipitated by the filing of a report with the trustee, debtor in possession or attorney and dealt with some aspect of the administration of the debtor's or bankrupt's estate, including on occasion a procedural problem arising from a contested or adversary proceeding.

In paragraph 7, you say:

> Judge Gartner would routinely meet with attorneys and trustees on many matters that he felt would aid the efficient administration of bankruptcy estates, and many attorneys and trustees practicing before Judge Gartner engaged in such conferences over the years.

Ms. Buerk, do you recall the specifics of the discussions, or were you privy to them, that is, did you overhear them so that you would know whether Judge Gartner was discussing administrative matters as opposed to substantive matters? Well, let me ask you before you answer that question, are you a[illegible]torney at law?

Ms. BUERK. No, sir.

Senator SPECTER. Do you have an understanding of the difference between an administrative matter in bankruptcy as opposed to a substantive matter?

Ms. BUERK. I believe I do, yes, sir.

Senator SPECTER. How would you define those differences?

Ms. BUERK. I would define a procedural matter as something to do with the administration of the estate as opposed to a litigation of a situation or a contested matter as they were commonly referred to under the act, something where you had a party on either side, you had a plaintiff and a defendant.

Senator SPECTER. Some make the distinctions that it may be appropriate for a bankruptcy judge to have a discussion on a procedural matter but not on a substantive matter. Are you familiar with the general distinction?

Ms. BUERK. Perhaps I did not understand you. Am I familiar with the——

Senator SPECTER. With the distinction that it may be appropriate for a bankruptcy judge to have an ex parte conversation on a procedural matter but not on a substantive matter?

Ms. BUERK. Yes, sir, I think so.

Senator SPECTER. And by "ex parte," of course, you understand that that is a meeting between the judge and one party, without the presence of other party or parties to the transaction?

Ms. BUERK. Yes, sir.

Senator SPECTER. Did Judge Gartner, to your knowledge, engage in ex parte conversations on substantive matters?

Ms. BUERK. No, sir. I would say no. On substantive matters, if you want to confine that to an occasion where an attorney needed a restraining order or something, he would have the party in, but he always wanted the other party to have a chance to be heard.

Senator SPECTER. Before he issued the restraining order?

Ms. BUERK. He would issue a temporary restraining order.

Senator SPECTER. He would issue a temporary restraining order.

Ms. BUERK. A temporary restraining order with an opportunity for the other side to be heard.

Senator SPECTER. Well, absent the emergency, and it is appropriate under some circumstances for a judge to issue a temporary restraining order on affidavit, depending on the circumstances, absent that kind of a temporary restraining order emergency situation, had you ever known Judge Gartner to discuss on an ex parte basis a substantive matter in pending litigation?

Ms. BUERK. I believe probably so, Senator, and there again, let me clarify what we are talking about there on a substantive matter if you want to take out of the restraining order category. There could be instances where a trustee might come in and decide he has an asset he may have wanted to do something with, and he would ask the judge's advice. That conversation may ultimately result in a complaint being filed or an adversary proceeding being filed. But in that instance there would have been ex parte contact.

Senator SPECTER. Would the trustee be an attorney customarily?

Ms. BUERK. Yes, sir.

Senator SPECTER. But that was a preliminary matter or advice which would then be followed by the filing of a legal document with notice to the other side?

Ms. BUERK. Yes, sir.

Senator SPECTER. So that the other side would have an opportunity to be heard before the decision was made by Judge Gartner?

Ms. BUERK. Yes, sir.

Senator SPECTER. Did you observe Judge Gartner engaged in ex parte contacts where there were only procedural matters involved?

Ms. BUERK. Yes, sir.

Senator **Specter**. Can you give me an illustration of that? I realize that that may be hard to do, and I would understand if you could not.

Ms. **Buerk**. Procedural probably would be something to do with the administration of the estate. A trustee needs to know what he is going to do with the distribution of the funds, should he put them in an interst-bearing account, just generally.

Senator **Specter**. I understand that you are generalizing. Do you remember any specific situation where a lawyer came to see Judge Gartner, on an ex parte basis, and had a conversation which you remember?

Ms. **Buerk**. Sure, but I do not think he did it daily.

Senator **Specter**. Were you customarily in the room when Judge Gartner had these conversations?

Ms. **Buerk**. I was in the room many times.

Senator **Specter**. What would the circumstances be when you would be in the room contrasted with when you would not be in the room?

Ms. **Buerk**. If he asked me to come in.

Senator **Specter**. Now, in what kind of a situation would he ask you to come in?

Ms. **Buerk**. I am not sure. They varied.

Senator **Specter**. Would he want you to take notes?

Ms. **Buerk**. Come in here. I may want you to take notes was the way he would say it. I might want you to get some of this down. Normally there were very few notes taken. Sometimes I did.

Senator **Specter**. And how many times, if you can give us an estimate, did you attend those ex parte meetings?

Ms. **Buerk**. More times than not.

Senator **Specter**. Well, over the course of the 13 years, several hundred times?

Ms. **Buerk**. Oh, yes, sir.

Senator **Specter**. Did you ever have any concern that something improper was occurring in the course of these ex parte meetings?

Ms. **Buerk**. No, sir.

Senator **Specter**. Referring now to your second affidavit, Ms. Buerk, paragraph 3, do you have that before you?

Ms. **Buerk**. Yes, sir.

Senator **Specter**. You say, quote, "It is my recollection that sometime in July 1977 after Judge Gartner read Judge Balick's opinion appointing a trustee for Freidco, Judge Gartner directed me to call Sherman Unger on the phone and, quote, 'Get him over here,'" close quote, and you made this affidavit on the 5th og October 1983.

What were the circumstances, Ms. Buerk, of your providing this affidavit?

Ms. **Buerk**. Mr. Unger phoned me.

Senator **Specter**. And asked you to do it?

Ms. **Buerk**. He asked me if I remembered the occasion, yes, sir, and asked me if I would submit the affidavit.

Senator **Specter**. Tell us, as closely as you can recall, about the conversation which you had with Mr. Unger at that time.

Ms. **Buerk**. It was about 8:00 in the morning or 8:30 in the morning, and Mr. Unger asked if I remembered the confusion with

Freidco and when Judge Balick issued the opinion that appointed the trustee in Wilmington, and he asked me if I remember how it got on the desk or did I remember that Mr. Rosenberg had placed it on my desk or put it to the judge.

And as close as I can remember, I said, yes, I did, and he asked if I'd submit an affidavit to that effect.

Senator SPECTER. Did you have a conversation with Mr. Unger at that time about Judge Gartner directing you to call Mr. Unger on the phone and say, quote, "Get him over here?"

Ms. BUERK. Yes, I think so. He asked me what I remembered about it, and I said I remembered that when it showed up on his desk he asked me why it was there, and "Get Sherman over here."

Senator METZENBAUM. I did not quite get that. Why what was there?

Ms. BUERK. Why Judge Balick's order—Judge Balick was the bankruptcy judge in Wilmington, Del.

Senator SPECTER. But your testimony is that you have a present recollection of Judge Gartner's giving you that instruction back in July 1977?

Ms. BUERK. Yes, sir.

Senator SPECTER. Are there any special circumstances which enable you to remember a conversation which is more than six years old?

Ms. BUERK. Well, the unusual circumstances were that the Unit complex was going on and there were several cases that were being held hotly contested, and the attorney in one of the cases presented an entry in another case he had nothing to do with.

Senator SPECTER. How does that affect your ability to remember the conversation? I do not quite follow that.

Ms. BUERK. Well, it was highly unusual that the attorney in the case that was being—I considered it unusual—the attorney in the case that was being very seriously contested in the other proceedings, in the Scioto Park proceeding, should submit to Judge Gartner an order by a bankruptcy judge in Wilmington, Del., on a case that Mr. Rosenberg had nothing to do with.

In fact, as a result of that, an other reason I would remember it, as a result of that all kinds of proceedings happened. Judge Gartner ended up being summoned to Delaware to testify. It all started with that.

Senator SPECTER. Was there a focus at that time on who had initiated the call, whether Mr. Unger had initiated the call to Judge Gartner or whether Judge Gartner had initiated the call to Mr. Unger?

Ms. BUERK. At that time, no, sir.

Senator SPECTER. So there was no focus on who called whom at that early date?

Ms. BUERK. No.

Senator SPECTER. Ms. Buerk, on how many occasions did you observe Mr. Unger meeting with Judge Gartner ex parte?

Ms. BUERK. That would be kind of hard to estimate, Senator. There were five or six of those cases going on. There were monthly reports filed in all of them.

Senator SPECTER. Would it be many times, dozens of times?

Ms. BUERK. A dozen, yes, at least.

Senator SPECTER. Two dozen?

Ms. BUERK. Probably. Probably no more than that.

Senator SPECTER. Were there many occasions where Mr. Unger was with Judge Gartner and other counsel were present?

Ms. BUERK. There were occasions, yes.

Senator SPECTER. Were there more occasions when Mr. Unger was by himself with the judge than when he was with other lawyers?

Ms. BUERK. Yes, sir.

Senator SPECTER. Do you know whether any other lawyers ever complained about Mr. Unger's meeting with the judge ex parte?

Ms. BUERK. No, sir, I do not know.

Senator SPECTER. Do you, by any chance, recall any of the matters discussed by Judge Gartner and Mr. Unger? I am looking here to see whether they were procedural or substantive, and I know it is a hard question for anybody to answer, especially someone who is not a lawyer, on matters going back a long time, but I would like to ask you that.

Ms. BUERK. There were—I was aware of the—most of the conferences were as a result of the monthly reports that were filed, and he followed those income statements, and if he saw something in them he did not like, he would call him.

Senator SPECTER. Were there ever any discussions on substantive matters that you recall?

Ms. BUERK. I am not sure. I do not think so. Were there ever did you say?

Senator SPECTER. Yes.

Ms. BUERK. There again, sir, you are going to get down to what you consider substantive. Judge Gartner did not consider—if an attorney was an attorney for or represented a debtor in possession, if he was doing something in the ordinary course of the business that the debtor would have to do and he came in and it would ultimately result in the filing of something, even if it was a substantive matter, yes, he would talk to him about it.

Senator SPECTER. So even if it was a substantive matter, Judge Gartner would talk ex parte to the attorney?

Ms. BUERK. Mostly on procedural, what he wanted him to do. Should he file the complaint now, should he wait, situations like that. I have heard him say, "Well, let us not get into that area. I might have to decide that."

Senator SPECTER. You have heard him say that?

Ms. BUERK. Yes, sir.

Senator SPECTER. Many times Judge Gartner said that?

Ms. BUERK. Well, if the occasion arose.

Senator SPECTER. Did you ever hear him say that to Mr. Unger?

Ms. BUERK. No, sir.

Senator SPECTER. Thank you very much, Ms. Buerk. Thank you very much for coming. Thank you, Mr. Chairman.

Senator HATCH. Thank you.

Do you have any questions, Senator Metzenbaum?

Senator METZENBAUM. Yes, Mr. Chairman.

Ms. Buerk, Judge Gartner when he testified in that case stated as follows:

> So in the course of one of the hearings counsel for I think it was Pittsburgh Bank put on my desk a copy of Judge Balick's decision appointing a trustee in Freidco. I read it. Did not pay too much attention to it, but I thought, why is he giving me this, why is counsel for creditor in Scioto Park giving me a copy of a decision in Freidco for my review. But again, as I say, I thought nothing of it until a few days later, I do believe Mr. Unger either called or stopped in and he said, "Judge, we are having trouble in Wilmington."

Either Judge Gartner who testified in that case was not telling the truth or you are not telling the truth, because he is saying that he did nothing with it and you are saying, in your affidavit, that he said to you, "Get him over here."

Was Judge Gartner totally wrong?

Ms. BUERK. Perhaps we have different recollections, Senator. There were different occasions that the judge had me call Mr. Unger over there. I recall this instance because as I explained to Senator——

Senator METZENBAUM. Gartner is testifying about this particular Balick order. Now, 6 years later Mr. Unger comes to you. Who prepared this affidavit? You or Mr. Unger or one of his associates?

Ms. BUERK. I did not.

Senator METZENBAUM. You did not. He handed you a piece of paper and asked you whether or not this was correct in accordance with your recollection, is that it?

Ms. BUERK. Yes, sir.

Senator METZENBAUM. Up until the time you saw this affidavit, had you used the words, "Get him over here" to Mr. Unger or to anybody?

Ms. BUERK. Had I used them?

Senator METZENBAUM. Had you used them?

Ms. BUERK. Up until when, sir?

Senator METZENBAUM. Up until you saw this affidavit in front of you?

Ms. BUERK. Sure. Judge Gartner used that term frequently.

Senator METZENBAUM. I undertand that. But what I am saying is that Judge Gartner indicated that this matter did not become an issue until Mr. Unger came to see him.

Ms. BUERK. Yes, sir.

Senator METZENBAUM. You say in this affidavit which was prepared by Mr. Unger or by one of his associates—who was it prepared by?

Ms. BUERK. I do not know.

Senator METZENBAUM. Who brought it to you?

Ms. BUERK. One of his associates.

Senator METZENBAUM. And they asked if you would you sign it?

Ms. BUERK. Yes, sir.

Senator METZENBAUM. Did they talk with you prior to the time the affidavit was prepared?

Ms. BUERK. No, sir, they did not.

Senator METZENBAUM. So when you got the affidavit, it came in in this form and until that point you had not discussed the matter with anybody, is that what you are saying?

Ms. BUERK. No, sir, I spoke to Mr. Unger that morning.

Senator METZENBAUM. You spoke with Mr. Unger that morning?

Ms. BUERK. Yes, sir.

Senator METZENBAUM. Did you tell him at that time—did you use the phrase that you had said that Judge Gartner said "get him over here?"

Ms. BUERK. Yes, sir.

Senator METZENBAUM. Who prepared the affidavit that was executed on January 15, 1983?

Ms. BUERK. I did.

Senator METZENBAUM. You actually typed it up yourself?

Ms. BUERK. Yes, sir.

Senator METZENBAUM. The second one you did not. The first one you did?

Ms. BUERK. Yes, sir.

Senator METZENBAUM. How long have you known Mr. Unger?

Ms. BUERK. I first saw Mr. Unger probably back in the 1960's when I was a notice clerk in the bankruptcy court. That is when I first saw him. I knew him only to say "Hi" to. Knowing him was when these Unit cases were filed.

Senator METZENBAUM. When Judge Gartner came back from testifying, did he tell you about his testimony?

Ms. BUERK. Generally, yes, sir.

Senator METZENBAUM. Did you tell him that he was wrong when he testified that Mr. Unger came in to see him before you—which is obviously in contradiction to that which your affidavit said, did you tell him he was wrong?

Ms. BUERK. No, sir.

Senator METZENBAUM. Why did you not tell him at that time?

Ms. BUERK. Because I do not think we discussed that. When he came back and we discussed his testimony, I asked him how it went, and I was more interested in the outcome of the case and whether Freidco was going to be transferred or what was going to be happening, what was the ultimate result.

Senator METZENBAUM. Did you ever read a transcript of Judge Gartner's testimony?

Ms. BUERK. Yes, sir, I have.

Senator METZENBAUM. When you read the transcript, did you go in to him and say to him, "You were wrong, Judge"?

Ms. BUERK. No, sir.

Senator METZENBAUM. Nothing further, Mr. Chairman.

Senator HATCH. Ms. Buerk, just a couple of questions. I do not think it is quite as harsh as Senator Metzenbaum has stated it, that either Judge Gartner is a liar or you are a liar. He did say in his testimony that: "But again as I say, I thought nothing of it until a few days later I do believe***" It is quite apparent he was upset with it all.

So let me just ask you this. Are the statements contained in your affidavits based upon your own independent recollection?

Ms. BUERK. Yes, sir.

Senator HATCH. So you are saying that those affidavits are true?

Ms. BUERK. Yes, sir.

Senator HATCH. Now, you are also saying, if I understand you correctly, that Judge Gartner asked you to get him over there.

Ms. BUERK. Yes, sir.

Senator HATCH. OK. I just want to make sure I understood one prior bit of your testimony. You indicated that the other attorney, Mr. Rosenberg, initiated what some may view as an ex parte contact with the judge.

Ms. BUERK. Yes, sir, he brought it over. He did not go in to see the judge I do not think, if that is what you mean.

Senator HATCH. One other thing. Mr. Aug testified at length. Are you familiar with Mr. Aug?

Ms. BUERK. Yes, sir.

Senator HATCH. What is his reputation in bankruptcy law in Cincinnati or elsewhere to your knowledge?

Ms. BUERK. He is considered an expert in Cincinnati.

Senator HATCH. Is he respected?

Ms. BUERK. Very much so. He is a professor at the law school.

Senator HATCH. Would Mr. Aug have been familiar with the detailed procedures in the case involved in this instance?

Ms. BUERK. The *Freidco* case?

Senator HATCH. Yes.

Ms. BUERK. At the time, I am not sure whether he was still involved in the case by the time Freidco was involved or not.

Senator HATCH. Thank you so much. We appreciate your coming and testifying. We know it has been an inconvenience to you and we apologize to you for it.

[NBA letter follows:]

HAND DELIVERED

NBA

Reply to: Dennis W. Archer
Penobscot Building
40th Floor
Detroit, MI 48226

Dennis W. Archer
President

Arthenia L. Joyner
President-Elect

Frank Seales, Jr.
Vice President

Thomas J. Broome
Vice President

Dolores P. Wilson
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General Counsel

Elliott S. Hall
Parliamentarian

John Crump
Executive Director

September 23, 1983

The Honorable Strom Thurmond
Chairman, Committee on the Judiciary
The United States Senate
SD-224 Dirksen Senate Office Building
Washington, D.C. 20510

RE: Court of Appeals for the Federal Circuit
Nominee, Sherman E. Unger

Dear Senator:

The National Bar Association, founded in 1925, is the oldest and largest association of minority lawyers in this country. We have a professional interest in the appointment of any nominee to the Federal Bench and have on many occasions appeared before your Committee to address the issues of competence, judicial temperament, intellectual ability, trial experience, character and conduct, and commitment to equal justice of candidates nominated to serve on courts of this country. Several weeks ago members of the National Bar Association requested that we review the background and qualifications of Sherman E. Unger, Nominee, Court of Appeals for the Federal Circuit.

Unfortunately, the Office of the Attorney General no longer timely advises the National Bar Association of nominees and appears to work exclusively with the American Bar Association. As a result, unless there has been an early, expressed interest in a particular candidate to support the nomination, or to oppose the nomination, the National Bar Association has not been in a position to offer fully documented testimony on each nominee to appear before your committee. Such is the case with Sherman E. Unger whom we would like to support.

We are aware of the American Bar Association's Standing Committee on Federal Judiciary opposition to Mr. Unger's nomination. We are not able to rebut or agree with the information the American Bar Association relies upon giving rise to their opposition because of inadequate lead time to conduct our own full investigation.

We are, however, able to speak with confidence about Sherman Unger's commitment to equal justice and his attitude on racial and social issues.

The National Bar Association has long advocated that the availability of capable minority counsel is vital to minority economic and community development. Sherman Unger's actions as General Counsel of the Department of Commerce reflect a shared recognition of that linkage. He has taken the initiative to promulgate legal guidance to officials of the Minority Business Development Agency to permit its grant-funded business development organizations to include legal assistance on matters of commercial law among the professional and technical services provided to minority entrepreneurs and firms.

Where they have placed Black lawyers in "traditional" roles, Mr. Unger has assigned a Black attorney to the non-traditional role of counseling officials both on matters of U.S. - Japan trade policy and issues relating to U.S. direct and reverse international investment, including the negotiation of bilateral investment treaties.

Assistant Secretary of Commerce for Economic Development, Carlos C. Campbell, served with Mr. Unger in the Department of Housing and Urban Development during the first Nixon Administration. Mr. Campbell found Mr. Unger's integrity to be beyond reproach. As head of a "client agency", EDA, within Commerce, Mr. Campbell found Mr. Unger's temperment and discernment to be flawless, strongly supportive of efforts to promote responsive debt management, equal opportunity, and effective use of program resources. Mr. Unger has on numerous occasions, provided positive legal remedies to support Assistant Secretary Campbell in instances where subordinate counsel attempted to render subjective and inordinately restrictive opinions.

On Friday, September 23, 1983, I spoke with Richard W. Ward, past president of the Cincinnati Bar Association and a fellow member of the ABA House of Delegates. Mr. Ward informed me that he had been a member of the Cincinnati Bar Association Grievance Committee from 1956 - 1975 and continued since that time to be a member of an executive committee. Mr. Ward stated that there has never been a grievance filed against Sherman Unger at any time from 1956 to the present time (1983).

We are pleased to have this opportunity to provide information which we hope will be considered by this Committee in its deliberations on this nominee. Moreover, we request that this letter be made a part of the record of the confirmation proceedings.

Very truly yours,

Dennis W Archer

Dennis W. Archer
President

Senator HATCH. Our final witness in opposition will be Mr. William T. Coleman, Jr., and Brooksley Born of the American Bar Association. While Mr. Coleman is coming up I will place into the record the letter we received on September 23, 1983, from the National Bar Association.

I will read into the record what they say afterward. Mr. Coleman, go ahead.

Senator METZENBAUM. Will you tell us what the thrust of it is, Mr. Chairman?

Senator HATCH. I was just reading the letter. I will place it in the record. The one paragraph I thought was pertinent here is:

> The National Bar Association has long advocated that the availability of capable minority counsel is vital to minority economic and community development. Sherman Unger's actions as General Counsel of the Department of Commerce reflect a shared recognition of that linkage. He has taken the initiative to promulgate legal guidance to officials of the minority business development agency to permit its grant funded business development organizations to include legal assistance on matter of commercial law among the professional and technical services provided to minority entrepreneurs and firms. Where they have placed Black lawyers in "traditional" roles, Mr. Unger has assigned a Black attorney to the nontraditional role of counseling officials both on matters of United States-Japan trade policy and issues relating to U.S. direct and reverse international investment including the negotiation of bilateral investment treaties.

He goes on to make a number of other statements, but I think it is just fair to put it in the record.

We will take your testimony now, Mr. Coleman.

Mr. COLEMAN. Mr. Chairman, did they not send you another letter?

Senator HATCH. Not that I know of. If they have, I have not received it. Did we get one this morning?

Mr. COLEMAN. They sent you another letter.

Senator HATCH. Is there a supplemental letter?

Mr. SHORT. There is a supplemental statement.

Mr. COLEMAN. Yes; I think that you ought to show that to Senator Metzenbaum.

Senator HATCH. I have not seen it. We will put that in the record as well.

Mr. COLEMAN. Well, I think you ought to read it.

Senator METZENBAUM. Can I also find out the thrust of that because it sounds as if the ball game may have changed?

Senator HATCH. Do you have a copy of it?

Mr. COLEMAN. I do not have a copy of it, but I was——

Senator HATCH. What is the thrust then, because I have not seen it.

Mr. COLEMAN. I do not believe in talking about a document I have not seen. There is such a document.

Senator HATCH. OK. Neither do I.

Mr. COLEMAN. I thought that you would read it. That is what I thought you were going to read.

Senator HATCH. We do not have a supplemental. This is the only letter I know of from the National Bar Association.

Mr. COLEMAN. I was informed that they had sent you another letter, sir.

Senator HATCH. If they have, I do not have it.

Mr. SHORT. We have not received it.

Senator HATCH. Let us have counsel for the committee look for it.

Senator METZENBAUM. Is the National Bar Association located here?

Mr. COLEMAN. To the best of my knowledge, the present president of it is not here.

Senator HATCH. Yes; it is located here according to this address.

Senator METZENBAUM. Could we not have staff inquire of them as to whether or not a second letter has been sent?

Senator HATCH. Well, be that as it may, if we get another statement from them, we will put it in the record.

[Aforementioned follows:]

NBA

Reply to:
4000 Penobscot Building
Detroit, MI 48226
(313) 963-8080

1983 OCT 27 AM 3 23

Dennis W. Archer
President

Arthenia L. Joyner
President-Elect

Frank Seales, Jr.
Vice President

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General Counsel

Elliott S. Hall
Parliamentarian

John Crump
Executive Director

October 24, 1983

The Honorable Strom Thurmond
Chairman, Committee on the Judiciary
The United States Senate
SD-224 Dirksen Senate Office Building
Washington, DC 20510

Re: Nomination of Sherman E. Unger for the Court of Appeals for the Federal Circuit

Dear Senator Thurmond:

Enclosed please find copies of letters to Judge Griffin B. Bell and Senator Hugh Scott relative to the National Bar Association's letter of September 23, 1983 to this Committee.

The record before the Committee indicates that our letter to this Committee may have inadvertently been misinterpreted by witnesses in hearings held on September 29, 1983 as an endorsement of Sherman E. Unger. That interpretation is incorrect as our letter contains no endorsement.

We ask that copies of the enclosed letters be made a part of the record of this Committee on the above nomination.

Sincerely,

Dennis W. Archer

DWA/ls
Encl.

NATIONAL BAR ASSOCIATION INC., 1773 T STREET, N.W., WASHINGTON, D.C. 20009 • (202) 797-9002
59th ANNUAL MEETING • JULY 27-AUGUST 4, 1984 • NEW ORLEANS, LA
Telex: 469510 Cable: NABAR WSH

NBA

Reply to:

4000 Penobscot Building
Detroit, MI 48226
(313) 963-8080

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James R. Haynes
General Counsel

Elliott S. Hall
Parliamentarian

John Crump
Executive Director

October 24, 1983

The Hon. Griffin B. Bell
2500 Trust Co. Tower
Atlanta, GA 30303

Re: Nomination of Sherman E. Unger for the Court of Appeals for the Federal Circuit

Dear Judge Bell:

It has come to the attention of the National Bar Association that, with reference to the above nomination, you may have inadvertently misinterpreted our letter of September 23, 1983 to the Judiciary Committee of the United States Senate.

The transcript of the hearings for the Committee held on September 29, 1983, at page 174 indicates that you testified as follows regarding the Unger nomination:

> "In fact, the National Bar has endorsed him [Unger]"

The above referenced statement that the National Bar Association has endorsed Mr. Unger is incorrect. We have not endorsed him for the Court of Appeals for the Federal Circuit.

We have not done so for several reasons, all of which are indicated clearly in our letter of September 23, 1983 to the Committee. First, we did not receive notice of the subject nomination from the Department of Justice. This would have permitted us to conduct our own investigation. Secondly, we had no independent information about Mr. Unger which would permit us to take a position on the issues raised by the American Bar Association in its report about the nominee.

Our objective in our letter of September 23, 1983 as stated in the letter, was simply to report to the Judiciary Committee of the United States Senate information regarding the nominee. We took no position on the overall qualifications of the nominee because, as stated earlier, we were not given the opportunity to undertake a broad investigation into this nominee's background. Such an investigation, we believe, is essential before we can, in good conscience, either endorse or oppose a Presidential nomination.

Sincerely,

Dennis W. Archer

DWA/ls

cc: ✓ Senator Strom Thurmond

NBA

Dennis W. Archer
President

Arthenia L. Joyner
President-Elect

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Vice President

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General Counsel

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John Crump
Executive Director

Reply to:

4000 Penobscot Building
Detroit, MI 48226
(313) 963-8080

October 24, 1983

Hugh Scott, Esq.
1000 Thomas Jefferson
Washington, DC 20007

Re: Nomination of Sherman E. Unger for the Court of Appeals for the Federal Circuit

Dear Senator Scott:

It has come to the attention of the National Bar Association that, with reference to the above nomination, you may have inadvertently misinterpreted our letter of September 23, 1983 to the Judiciary Committee of the United States Senate.

The transcript of the hearings for the Committee held on September 29, 1983 at page 7 indicate that you testified as follows regarding the Unger nomination:

> "I will simply close by saying that the National Bar Association endorsement is very important . . ."

The above referenced statement that the National Bar Association has endorsed Mr. Unger is incorrect. We have not endorsed him for the Court of Appeals for the Federal Circuit.

We have not done so for several reasons, all of which are indicated clearly in our letter of September 23, 1983 to the Committee. First, we did not receive notice of the subject nomination from the Department of Justice. This would have permitted us to conduct our own investigation. Secondly, we had no independent information about Mr. Unger which would permit us to take a position on the issues raised by the American Bar Association in its report about the nominee.

Our objective in our letter of September 23, 1983 as stated in the letter, was simply to report to the Judiciary Committee of the United States Senate information regarding the nominee. We took no position on the overall qualifications of the nominee because, as stated earlier, we were not given the opportunity to undertake a broad investigation into this nominee's background. Such an investigation, we believe, is essential before we can, in good conscience, either endorse or oppose a Presidential nomination.

Sincerely,

Dennis W. Archer

DWA/ls

cc: Senator Strom Thurmond

TESTIMONY OF WILLIAM T. COLEMAN, JR., AND BROOKSLEY BORN, AMERICAN BAR ASSOCIATION

Mr. COLEMAN. Thank you, Mr. Chairman. You said that we had the right to submit a supplemental statement on behalf of the American Bar Association.

Senator HATCH. That is correct.

Mr. COLEMAN. And it is my understanding that you wanted us to submit it certainly by Monday, and I think it was submitted by Monday. Just about 5 minutes ago I got a document from Mr. Sherman Unger's which is his supplemental testimony. I did not get it from him. I got it from somebody else. I had assumed that if he were going to submit another statement, he would have submitted in time for me to look at it. I have not looked at it thoroughly, but I will call attention to one or two things as I go along.

Senator HATCH. Well, Mr. Coleman, he has only had a few days to submit. I feel sorry about that but let us proceed.

Mr. COLEMAN. Yes; I thought that I would just hit a few high spots. Would you be kind enough to print the entire statement and the exhibits in the record.

Senator HATCH. Without objection we will place the entire statement and exhibits in the record.

[Statement follows:]

SUPPLEMENTAL STATEMENT OF

WILLIAM T. COLEMAN, JR. ON BEHALF OF
THE AMERICAN BAR ASSOCIATION

BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NOMINATION OF SHERMAN EDWARD UNGER AS
UNITED STATES CIRCUIT JUDGE FOR THE
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

OCTOBER 27, 1983

On September 29, 1983, I testified on behalf of the American Bar Association in opposition to the nomination of Sherman E. Unger as United States Circuit Judge for the U.S. Court of Appeals for the Federal Circuit. The written statement submitted on behalf of the American Bar Association and the accompanying exhibits were made part of the record. Tr., Sept. 29, 1983, p. 51. Both the written and oral testimony reviewed the investigation I conducted as the D.C. Circuit representative on the ABA's Standing Committee on the Federal Judiciary ("ABA Committee"), with the assistance of Brooksley Born and Lewis H. Van Dusen, Jr., into Mr. Unger's qualifications, and explained the basis for the ABA's conclusion that Mr. Unger is not qualified to be a Federal Circuit Judge because he lacks personal integrity and judicial temperament.

It is important to bear in mind that the ABA Committee's investigation and evaluation of potential nominees are done at the request of the Justice Department (see Exhibit A, attached hereto), and that the prospective nominee provides information to the ABA at the Justice Department's request. When the office of the Attorney General selects a potential judicial nominee for recommendation to the President, it asks the person to fill out a Personal Data Questionnaire that was jointly developed by the ABA Committee and the

Justice Department. The prospective nominee is asked by the Justice Department to send one copy of his or her responses to the Questionnaire to the Justice Department, one copy to the chairperson of the ABA Committee, and one copy to the appropriate Circuit representative on the ABA Committee to facilitate the ABA Committee's investigation of the nominee's qualifications. See Exhibit B, attached hereto. Mr. Unger sent me the completed Questionnaire at the Justice Department's request. See Exhibit C, attached hereto.

The ABA Committee unanimously found that Mr. Unger was not qualified to be a Federal Circuit Judge because he lacked personal integrity and judicial temperament. The earlier testimony on behalf of the ABA Committee reported to the Senate Judiciary Committee Mr. Unger's success as an attorney both in private practice and in the Department of Commerce. See Statement of William T. Coleman, Jr., on Behalf of the American Bar Association, September 29, 1983 ("ABA Statement"), pp. 11-14. Nevertheless, because of documented instances of misconduct by Mr. Unger, which we have reported to the Judiciary Committee, the ABA believes it is inappropriate for him to serve on the federal bench.

The testimony of Mr. Unger and of some of the other witnesses* during the confirmation hearings has shed additional light, unfavorable to Mr. Unger, on the allegations against him and on his statements to both the ABA Committee and the Department of Justice. The confirmation hearings also raised new allegations of wrongdoing by Mr. Unger, which were never brought to the attention of the ABA Committee. Finally, Mr. Unger's testimony over the four days of confirmation hearings reflected his tendency to present continually changing responses to the allegations against him, a tendency which marked the ABA's investigation of Mr. Unger as well.

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* Jay Rosenberg, of Cincinnati, Ohio, filed written testimony and appeared in person on September 29, 1983 to testify in opposition to Mr. Unger, but had to leave before he was called to testify. Robert T. Keeler, also from Cincinnati, filed written testimony in opposition to Mr. Unger, and Leon S. Forman, of Philadelphia, Pennsylvania, submitted written testimony in opposition to Mr. Unger in the form of a sworn affidavit. See Exhibit D, attached hereto. Max S. Bell, an attorney from Wilmington, Delaware, testified in opposition to Mr. Unger. Richard C. Van Dusen, former Under Secretary of HUD and now a practicing attorney in Detroit, Michigan, filed a written statement and testified in person in opposition to Mr. Unger. George Romney, the former Secretary of HUD, also filed a statement which is adverse to Mr. Unger's testimony. See Exhibit J, attached hereto. Two individuals with whom the ABA had had no contact -- Paul P. Welsh, of Wilmington, Delaware, and Justice Andrew G.T. Moore, II of the Delaware Supreme Court -- also appeared to testify against Mr. Unger. Robert G. Stachler and Gary P. Kreider, both of Cincinnati, also authorized the ABA to report their statements, which are adverse to Mr. Unger. See ABA Statement, pp. 46, 49.

Mr. Unger testified that "nobody from Cincinnati or Washington, D.C. where I maintain offices has appeared yet to testify against me. We do have people from Wilmington who have appeared to testify against me." Tr., Oct. 6, 1983, p. 37.

I. IMPROPER EX PARTE CONTACTS.

> The testimony of Mr. Unger and others shows that (1) Mr. Unger had one or more ex parte meetings with Judge Gartner; (2) during an ex parte meeting, Mr. Unger on his own initiative asked Judge Gartner to reverse a previous ruling which had been decided against Mr. Unger's client; (3) Mr. Unger filed an application, a memorandum of law, and a proposed order to obtain that result without notifying opposing counsel and without ever serving them with copies of those documents; and (4) the subject matter of this request and the action Mr. Unger sought from the Judge involved a substantive, controverted matter in litigation, not matters concerning the administration of the debtor's estate, as Mr. Unger originally contended. Such conduct is clearly unethical.

As previously stated in my written testimony, the ABA Committee received evidence of three separate instances in which Mr. Unger engaged in improper ex parte contacts on contested matters in litigation. See ABA Statement, pp. 18-33. In our interviews with Mr. Unger, he denied ever engaging in improper ex parte contacts. As to the specific allegation that Mr. Unger met ex parte with Judge Gartner, a bankruptcy judge in Ohio, Mr. Unger stated in a letter to the Justice Department, which he sent to the ABA Committee, that "[t]he only ex parte contacts I had with Judge Gartner were conferences on administration of a Debtor in Possession, generally at the request of Judge Gartner." ABA Statement, Exhibit 4, p. 4. The written testimony submitted by

Mr. Unger to the Senate Judiciary Committee reiterated this position.*

Most of the testimony at the confirmation hearings on the subject of Mr. Unger's ex parte contacts focused on the allegation that Mr. Unger met ex parte with Judge Gartner to discuss how to nullify the appointment of a trustee in the Freidco bankruptcy proceeding in Delaware, which had disadvantaged Mr. Unger's client, Unit, Inc.** Mr. Unger requested that Judge Gartner reconsider his previous ruling denying consolidation of the Unit, Inc. and Freidco proceedings before him in Ohio, and filed an application for reconsideration, a supporting memorandum of law, and a proposed order, all without notice to or service on opposing counsel. On July 14, 1977, Judge Gartner issued an order vacating his prior decision.

The testimony received by the Senate Judiciary Committee, including Mr. Unger's explanations, makes it clear that certain facts concerning this matter are no longer in dispute.

First, it is undisputed that Mr. Unger met ex parte with Judge Gartner.

Second, regardless of who initiated Mr. Unger's conference with Judge Gartner, it is undisputed that Mr. Unger initiated the request that Judge Gartner vacate his earlier order and take jurisdiction over the Freidco proceeding. Judge Gartner himself testified that it was Mr. Unger who had raised this issue. See ABA Statement, Exhibit 11, pp. 13, 46 ("He [Mr. Unger] came in and he said, 'Would you consider the possibility of taking back jurisdiction in the Freidco matter? We are in trouble.'"). In his brief to the Third Circuit, Mr. Unger stated that he had raised this issue, see ABA Statement, Exhibit 17, p. 9, and Mr. Unger also admitted in his testimony that he had initiated the request. See Tr., Oct. 5, 1983, p. 169; Tr., Oct. 6, 1983, p. 30, see also Tr., Oct. 5, 1983, pp. 143, 146 (testimony of Justice Moore).

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* Mr. Unger's written testimony states that "Judge Gartner, acting in his role as manager of the Unit, Inc. bankruptcy proceeding, asked me to his office for an administrative conference . . . ." Statement of Sherman E. Unger, Sept. 29, 1983, p.5.

** Leon S. Forman, an attorney from Philadelphia, Pennsylvania, who was involved in the Scioto Park bankruptcy litigation before Judge Gartner, has submitted a sworn statement which said that Mr. Unger also had engaged in ex parte communications in that litigation. Mr. Forman stated: "There were a number of occasions when it was obvious that he was having private conversations with the Court. This was evident when he was seen leaving the Judge's chambers just prior to the time set for hearings in the case, or from remarks made by the Court during the hearings." (See Exhibit D, attached hereto, p. 3.)

Third, it is undisputed that Mr. Unger's request that Judge Gartner reverse his previous ruling -- on a matter that had been contested by the opposing parties in Freidco -- took place without notice to the opposing parties or their counsel. At some point during the first ex parte conference with Judge Gartner, or perhaps at a second one, Mr. Unger filed a written application for reconsideration and an eight-page memorandum of law, see ABA Statement, Exhibit 8, as well as a proposed order, which Judge Gartner rejected because it was too strong. See ABA Statement, pp. 21-22, 25-26; Tr., Oct. 6, 1983, pp. 43-45. Opposing counsel were not present at the time Mr. Unger submitted these documents to the Judge and discussed them with him, nor were they served copies of those papers. Indeed, although opposing counsel received copies of the ex parte order issued by Judge Gartner, Mr. Unger never served them copies of the application, the memorandum of law, or the proposed order he filed with the Judge. Ultimately, they obtained copies of the application and the memorandum, but not the proposed order,* from the Ohio Bankruptcy Court, but only after the actual ex parte order had been issued and served on them.

---

* Mr. Unger has never produced a copy of his proposed order. Tr., Oct. 6, 1983, p. 45.

See Statement of Paul P. Welsh, Oct. 5, 1983, Exhibit 8, pp. 11-13; ABA Statement, Exhibit 13, pp. 24-27.

Fourth, Mr. Unger ultimately conceded that his ex parte discussions with Judge Gartner and the action he sought from him undeniably involved substantive, controverted matters in litigation, not matters concerning the administration of the debtor's estate. Nevertheless, throughout the ABA Committee's investigation and throughout most of the confirmation hearings, Mr. Unger steadfastly maintained that his ex parte meeting with Judge Gartner was an administrative conference concerning the administration of the debtor's estate which, he argued, could properly be held on an ex parte basis prior to the 1978 changes in the federal bankruptcy laws. Mr. Unger advanced this argument in his written testimony, see Statement of Sherman E. Unger, Sept. 29, 1983, pp. 5-7, and in his oral testimony before the Senate Judiciary Committee, stating repeatedly that his meeting with Judge Gartner was an "administrative conference." See, e.g., Tr., Oct. 5, 1983, pp. 26, 39, 96, 122-23.

Ex parte communications on contested litigation matters have always been improper and unethical, even with bankruptcy judges prior to 1978. Mr. Unger's own witness, J. Vincent Aug, the "dean" of the Cincinnati bankruptcy bar, admitted this in his testimony. Tr., Sept. 29, 1983, pp. 210-11.

Mr. Unger's communications with Judge Gartner cannot properly be described as "administrative" in nature. As discussed in my previous testimony, the proper location of the Freidco proceeding was a contested issue from the outset of the litigation. See ABA Statement, p. 20. Judge Gartner had previously declined to consolidate the Freidco and Unit, Inc. proceedings in Ohio, after a full hearing at which the opposing parties in Freidco were represented by counsel. See id. In addition, the possible appointment of a trustee for Freidco was a hotly contested issue in the Delaware proceeding. See Statement of Paul P. Welsh, Oct. 15, 1983, Exhibit 8, pp. 8-9. The appointment of a trustee was, as Max S. Bell, one of the opposing counsel in Freidco, testified, a "major setback" for both Unit, Inc. and Freidco. Tr., Sept. 29, 1983, p. 197. It was after the trustee had been appointed that Mr. Unger sought, without notice to opposing counsel, to have Judge Gartner reverse his previous ruling. See ABA Statement, pp. 21, 25. During their ex parte meeting, Judge Gartner told Mr. Unger that he would "take a second look" at whether a trustee was appropriate for Freidco if he took jurisdiction over that case. See ABA Statement, Exhibit 12, p. 14; id., Exhibit 11, pp. 52-53.

Nor can there be any doubt that Mr. Unger intended the ex parte order he secured from Judge Gartner to have substantive legal effect in the Freidco proceeding. Justice Andrew G.T. Moore II, of the Supreme Court of Delaware, Mr. Unger's co-counsel in the Freidco proceeding, testified that Mr. Unger had told him that he raised this issue with Judge Gartner because he felt "he was going to get nowhere in the Delaware bankruptcy court and felt that the best recourse was to obtain some form of relief in Ohio." Tr., Oct. 5, 1983, p. 143. According to Justice Moore, Mr. Unger felt that they "were in a superior position" as a result of the ex parte order because the Ohio bankruptcy court might still reclaim jurisdiction over the Freidco matter, id. at 143; in obtaining the ex parte order from Judge Gartner "Mr. Unger felt that he had scored a tremendous legal coup." Id. at 146. Eight days after obtaining the July 14, 1977 ex parte order from Judge Gartner, Mr. Unger argued before Bankruptcy Judge Balick in the Freidco proceeding that the order had the effect of staying her jurisdiction over the Freidco matter. See ABA Statement, Exhibit 15, pp. 9, 39.

In concluding that Mr. Unger's actions were "completely inconsistent with the Canons of Ethics," the U.S. Court of Appeals for the Third Circuit explicitly rejected Mr. Unger's argument that the ex parte meeting was proper because it involved administrative matters. See ABA Statement, Exhibit 13, pp. 11-14, 30-34.

After repeatedly stating that his ex parte meeting with Judge Gartner was an administrative conference, Mr. Unger finally conceded in response to questioning by Senators Specter and Hatch that substantive, controverted matters, as opposed to administrative matters, were addressed in his meeting with Judge Gartner and that those matters could not properly be discussed on an ex parte basis. See Tr., Oct. 5, 1983, pp. 122-29, 169; Tr., Oct. 6, 1983, pp. 45-46.

> Senator Specter. Now without taking the time to read this Memorandum Of Law, which I am now looking at for the first time, does this involve a substantive question on which there is a controversy between you and the other side?
>
> Mr. Unger. I think it does. . . .
>
> . . . .
>
> Senator Specter. [Y]ou agree at this point that the substantive matter contained within the application or memorandum was a substantive matter, not an administrative matter, but a substantive matter, on which there would have been a controversy, that would have been asserted by opposing counsel, had opposing counsel been present.
>
> Mr. Unger. I think that is correct. I think the conference wavered back and forth and went too far.

Id. at 45-46.

The only issue still disputed by Mr. Unger is whether he or Judge Gartner initiated the meeting in the Judge's chambers during which the ex parte communications and submissions took place. Mr. Unger testified at the hearings that Judge Gartner had his secretary call him to set up that meeting. Even if true, his contention is of little import since, as discussed above, Mr. Unger admits that he initiated the request that the Judge vacate a previous, substantive ruling. There is, moreover, a great deal of evidence that Mr. Unger himself requested the ex parte meeting with Judge Gartner. Judge Gartner stated in his testimony before District Judge Stapleton in Delaware that Mr. Unger had initiated the ex parte meeting. See ABA Statement, Exhibit 11, pp. 10-11, 46. In addition, the brief filed by Mr. Unger in the Third Circuit in the Freidco case clearly states that Mr. Unger requested the conference with Judge Gartner to discuss the developments in Freidco. ABA Statement, Exhibit 17, p. 8. Justice Moore also testified that, to the best of his recollection, Mr. Unger told him that he had initiated the ex parte conference with Judge Gartner. See Tr., Oct. 5, 1983, pp. 142-43, 146.*

Even if Judge Gartner did initiate the meeting, however, there is no justification for the unethical conduct that took place at that meeting on Mr. Unger's initiative.** As shown above, it was Mr. Unger who raised the substantive issue of how to rectify the appointment of the trustee in Freidco, asked Judge Gartner to vacate his previous ruling on what was admittedly an important issue that had already been litigated, and filed the papers with the Judge to obtain that result. Any interpretation of Mr. Unger's testimony demonstrates that he had the opportunity and the obligation to notify his opposing counsel before undertaking the ex parte actions described above. If Judge Gartner initiated the meeting and told him by telephone the purpose of the meeting, Mr. Unger should have notified his opposing counsel before going to see the Judge. If Mr. Unger did not know the purpose of the meeting when he went to see the Judge, surely he was under an obligation to notify opposing counsel before asking Judge Gartner to take ex parte action on a controverted matter. If as Mr. Unger suggests, Judge Gartner requested that he file an application for reconsideration, Mr. Unger should have notified opposing counsel when he returned to his office to draft the application and the accompanying memorandum of law.* Certainly he should have notified them before he filed these papers with the Judge. Finally, although Mr. Unger's written testimony states that he "submitted an application and a proposed order," Statement of Mr. Unger, p. 6, Mr. Unger subsequently testified that, upon Judge Gartner's request during the ex parte meeting, he had his associate, Michael Kohn, bring over a proposed order. See Tr., Oct. 6, 1983, pp. 43-45. If so, Mr. Unger had yet another chance to notify opposing counsel before presenting a proposed order on which the Judge might act.*

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* This specific, documented evidence that Mr. Unger initiated the conference weighs heavily against the contrary affidavit of Bonita Buerk, dated October 5, 1983, in which she states that in July 1977, after Judge Gartner read Judge Balick's opinion appointing a trustee for Freidco, Judge Gartner instructed her to call Mr. Unger and "get him over here." That affidavit was drafted by a member of Mr. Unger's former law firm and signed by Ms. Buerk on the morning of October 5, 1983 before the hearing began. See Tr., Oct. 5, 1983, pp. 32-35. In a previously submitted affidavit, dated January 14, 1983, Ms. Buerk offered no such precise recollection of what happened over six years earlier in July 1977, stating only that it was Judge Gartner's practice to call attorneys to his chambers to discuss pending matters. See ABA Statement, Exhibit 16.

** Mr. Unger concedes that otherwise improper conduct cannot be justified by the fact that the Judge called the meeting. See Tr., Oct. 5, 1983, pp. 127-28.

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* Mr. Unger has not made clear when he drafted the application and memorandum of law. If Mr. Unger had already prepared these documents and brought them with him when he first went to see the Judge, he obviously initiated the meeting himself or at least intended from the outset to try to persuade the Judge, ex parte, to take action. If he prepared the documents following the Judge's request during their initial meeting, presumably he returned to his office to draft the papers. He was obliged to notify opposing counsel before returning to the Judge's chambers to present the application and supporting memorandum.

II. UNREPORTED INCOME ON 1968 FEDERAL INCOME TAX RETURN.

> Despite inquiries by the ABA Committee, Mr. Unger never told the ABA Committee that he failed to report $40,000 of income on his 1968 tax return. It is undisputed that Mr. Unger was under civil and criminal investigation by the IRS, and that he filed an amended return declaring this income only after receiving an audit notice.

Question 20 of the Personal Data Questionnaire, sent by the Justice Department to Mr. Unger, asks whether a "tax lien or other collection procedure [has] ever been instituted against you by federal, state or local authorities? If so, give particulars." ABA Statement, Exhibit 2. Mr. Unger responded in the negative to this question. He also responded negatively to Question 19, which asks whether he has ever been under investigation for possible violation of a federal criminal statute.

It came to our attention during our investigation of Mr. Unger that he had had difficulties with the IRS over a past tax return. When we raised this issue in one of our interviews with Mr. Unger, he explained that an IRS audit of his 1968 federal tax return had involved an issue about constructive income relating to an upstream merger, that the issue had been resolved, and that he ultimately paid $3100 of additional taxes, only 2% of what the IRS had initially claimed. As I testified on September 29, 1983, in light of the information provided by Mr. Unger, we did not pursue this matter or rely upon it in opposing Mr. Unger's nomination. At no time during the ABA Committee's investigation did Mr. Unger inform us that, during 1968, the very same tax year, he had failed to report approximately $40,000 in income on his federal tax return or that he had been under criminal investigation by the Intelligence Division of the IRS concerning that return.*

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* Mr. Unger's testimony that Judge Gartner requested that he prepare an order is significant in one other respect. Mr. Unger stated during the hearings that, although he filed the application and memorandum ex parte, he had no idea whether Judge Gartner was going to act on the application ex parte. See Tr., Oct. 6, 1983, pp. 31, 45-46. But if, after having seen Mr. Unger's application and memorandum, Judge Gartner specifically asked Mr. Unger to prepare an order (which Mr. Unger knew to be contrary to the Judge's usual practice, id. at 44), it certainly should have occurred to Mr. Unger that the Judge was considering acting on Mr. Unger's request.

Moreover, when asked by the Justice Department about the IRS investigation that caused him to withdraw from his FCC nomination, _see_ ABA Statement, Exhibit 3, Mr. Unger described only the "constructive income" issue which he said was settled for $3,023.42, without mentioning his failure to report $40,000 as income in the same tax year or his payment of over $20,000 in additional taxes, interest and penalties. _See id._, Exhibit 4, p. 3.

This information was raised by Senator Metzenbaum during the September 29, 1983 hearing. In his testimony Mr. Unger did not dispute that he failed to report $40,000 of income in 1968 and was required to pay $23,262.98 in additional taxes, interest, and negligence penalties. _See, e.g._, Tr., Oct. 5, 1983, pp. 88-90; IRS Report, dated April 15, 1971 (Exhibit E, attached hereto), p. 1; IRS Report, dated

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* Mr. Unger testified that he was aware that the IRS Intelligence Division was investigating him. _See_ Tr., Oct. 5, 1983, pp. 79, 88, 119.

Jan. 13, 1972 (Exhibit F, attached hereto).* Nor is it disputed that he was under criminal investigation. See Tr., Oct. 5, 1983, pp. 79, 88.

Mr. Unger offered conflicting, and in some respects misleading, testimony on this matter. On September 30, 1983, Mr. Unger testified that (1) the $40,000 of unreported income was a legal fee; (2) he immediately signed the check to him for $40,000 over to a corporation for stock, and did not enter it into his checking account; (3) he failed to report the $40,000 because he prepared his tax return from his checkbook and that money was never entered in his checkbook; (4) he filed an amended return declaring this as income and paid tax on it after the issue was raised in the initial audit by the IRS; and (5) he was in an exceptionally high tax bracket at that time. See Tr., Sept. 30, 1983, pp. 18-20. Later that day, Mr. Unger reiterated that he had not corrected his return voluntarily, but had done so after the omission of $40,000 had been pointed out to him in the audit. See id., pp. 62-63.

On October 5 and 6, 1983, Mr. Unger changed his testimony, stating that (1) the $40,000 was not a legal fee but a "sale of rights" to purchase stock in a corporation;** (2) the money, in two $20,000 checks, was deposited in his checking account; (3) he wrote a check for $30,000 to pay for a one-third interest in the stock of a corporation, leaving over $9,000 in his checking account; (4) he discovered his failure to report the $40,000 of income on his own and filed an amended return and paid tax on that income in May 1970, before the audit began; and (5) according to Mr. Unger's amended 1968 return, he had a gross income of $101,330, indicating that he had initially omitted to report approximately 40% of his income for that year. See Tr., Oct. 5, 1983, pp. 49-51, 80-81, 118; Tr., Oct. 6, 1983, p. 26.

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* Mr. Unger paid $16,988.99 of these additional taxes on May 20, 1970, and the remaining $6,273.99 on December 31, 1970. See Exhibit E, p. 1.

** In its April 15, 1971 report, the IRS described the $40,000 as a finder's fee. See Exhibit E, p. 1.

Mr. Unger attributed the inconsistency between his testimony on September 30 and his testimony on October 5 to the fact that he was testifying from memory alone on the first day while he was testifying from his records on the latter day. Mr. Unger, however, gave no indication during his September 30, 1983 testimony that he had any difficulty recalling the events surrounding his failure to report the $40,000. On the contrary, he explained the course of events without hesitation or uncertainty.*

Mr. Unger emphasized in his later testimony that he amended his return before the IRS audit began and that he discovered his failure to report the $40,000, and took steps to correct it, before he was ever informed that the IRS was looking into this matter.** Although his first meeting with the IRS auditor, according to Mr. Unger, was not until July 1970, see Tr., Oct. 5, 1983, p. 60, Mr. Unger testified that he received a letter from the tax auditor in March 1970 stating that his 1968 return was going to be audited. Id., pp. 52, 60. Mr. Unger testified, however, that he informed the IRS of his omission in January 1970, by raising the issue with Paul Eggers, then General Counsel to the Department of Treasury, who in turn revealed it to the Chief Counsel of the IRS. See id. pp. 49-50, 60, 110-112 (attached hereto as Exhibit G).

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* Although Mr. Unger maintained that he testified from memory on September 30, 1983 because the tax allegations had just been raised the previous day, see Tr. Oct. 5, 1983, pp. 54-55, 62-63, Mr. Unger apparently submitted information to the Senate Judiciary Committee sometime after May 3, 1983 describing the $40,000 income issue. See id. pp. 135-36.

** The January 13, 1972 IRS Report states that "No part of the $40,000 was reported as income on the original return filed by the taxpayer, but after the examination of his return was started an amended return was filed in which he reports the sale of two-thirds of his rights for $40,000 less reimbursement costs for a balance of a short-term capital gain of $36,556.85." See Exhibit F, p. 5 (emphasis added).

The affidavit of Paul Eggers submitted by Mr. Unger (Exhibit H, attached hereto) makes it clear that Mr. Unger did not make a formal or complete disclosure to the IRS through Mr. Eggers. On the contrary, the Eggers affidavit states that, at a club, on the way home from a reception, Mr. Unger mentioned in the course of conversation that he had failed to include some income from a sale in his 1968 tax return. The affidavit notes that Mr. Unger "did not state the amount or type of transaction." Finally, the affidavit states that Mr. Eggers informed Martin Worthy, Chief Counsel of the IRS, about Mr. Unger's statements to him, but it does not indicate that Mr. Unger requested that the IRS be informed or even that Mr. Unger was made aware of the fact that Mr. Eggers had spoken to Mr. Worthy.*

Regardless of how one views the testimony, it is clear that (1) Mr. Unger received $40,000 in income in June 1968 (see Exhibit F, p. 1); (2) when he filed his original

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* Mr. Unger testified that he was willing to pay tax on the $40,000 even though his Washington, D.C. tax counsel, the law firm of Silverstein & Mullens, suggested that it might not be taxable income.

> "Silverstein & Mullens subsequently wrote a letter to my Cincinnati tax counsel confirming that they suggested that it may not in fact be a taxable event. I concluded that I did not want any outstanding issue; I did not want any debate. I was willing to pay the tax."

Tr., Oct. 5, 1983, p. 50.

The letter from Silverstein & Mullens (Exhibit I, attached hereto), however, states that, after examining the appropriate documents, they concluded that "the transaction should be reported in the manner reflected in the amended return," i.e., as taxable income.

1968 return 10 months later on April 15, 1969, he failed to report the $40,000 as income, although it was approximately 40% of his actual income that year; (3) Mr. Unger did not amend his return or pay taxes on the additional $40,000 until after he received an audit notice from the IRS in March 1970 and after an IRS criminal investigation concerning his 1968 tax return had begun; and (4) Mr. Unger's answers to questions posed by the ABA Committee and the Justice Department were misleading and inaccurate.

III. SUBMISSION OF FALSE AFFIDAVITS.

> It is undisputed that in seeking appointment as counsel for the debtor, Mr. Unger filed affidavits falsely stating that he had no relationship to the debtors. In addition, Delaware Supreme Court Justice Andrew G. T. Moore, II testified that on the eve of trial, Mr. Unger filed a motion to disqualify counsel for the trustee in Freidco that was based on a false affidavit by Mr. Unger. When Justice Moore pointed this out to Mr. Unger, he nevertheless pursued the motion. As a result, Justice Moore resigned as his co-counsel.

As discussed in detail in the initial ABA Statement, pp. 33-38, Mr. Unger filed affidavits in the Unit, Inc. and Scioto Park, Ltd. bankruptcy proceedings in connection with petitions of the debtors to have Mr. Unger appointed as their counsel. Each of those one-page affidavits falsely stated that Mr. Unger had no relationship to the debtor.

J. Vincent Aug, the attorney who prepared the affidavits in question, testified on Mr. Unger's behalf at the confirmation hearings. He stated that he did not know of Mr. Unger's "2 percent interest in the Unit, Inc., Limited Partnership," but that within thirty days after the affidavit was filed, schedules were filed in Unit, Inc. revealing Mr. Unger's 2% interest. Tr., Sept. 29, 1983, p. 203. The Statement of Affairs filed by Unit, Inc., see ABA Statement, Exhibit 28, does not reflect the 2% interest referred to by Mr. Aug. Nor does it show that Mr. Unger and Unit, Inc. were partners in both Hillcrest Square, Ltd. and Scioto Park, Ltd. The Statement of Affairs filed by Scioto Park, _see_ ABA Statement, Exhibit 24, indicates that Mr. Unger was a partner in Scioto Park, Limited, but reveals no percentage ownership interest.*

Both Mr. Unger and Mr. Aug emphasized in their testimony that Mr. Unger did not have an interest adverse to the debtors in those proceedings. _See_ Tr., Sept. 29, 1983, pp. 203, 207; Tr., Sept. 30, 1983, p. 46. The affidavits filed by Mr. Unger, however, clearly stated that, in addition to having no adverse interest, Mr. Unger had _no relationship_ to the debtor.** _See_ ABA Statement, Exhibits 22 and 26. A responsible attorney should not sign a simple, one-page affidavit containing a statement that is clearly untrue. Moreover, it stands to reason that the purpose of requiring an attorney to file such an affidavit before his appointment as counsel for the debtor is to allow the court to make its own assessment, based on complete and accurate information provided by the attorney, of whether the attorney should serve in that capacity.

Mr. Unger provided varying responses to questions about how he could have signed one-page affidavits that contained untrue statements. Mr. Unger first agreed with Senator Hatch's statement that he relied on Mr. Aug and "did not really look at the affidavit" himself. Tr., Sept. 30, 1983, p. 47. In response to questions by Senator Specter, however, Mr. Unger stated that he probably read the affidavit before signing it, but "probably did not understand the import of it." _Id_. at 67. He testified that as a matter of habit he would have read such an affidavit and that he would have studied "the substantive content to make sure that it [was] precise and accurate." Id. at 68. Although he had testified to Senator Hatch that he probably had not read the affidavit himself, he stated to Senator Specter that "[i]n this particular instance, I was really relying too much on Mr. Aug. I did not read relationship to mean any mutual investment. I suppose I should have." Id. at 69. See also id. at 71 ("I think where I went wrong in the affidavit is I misread the statement relationship and did not reflect it to mean a mutual investment.").

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* We have seen no other "schedules" filed by the debtors in those proceedings.

** Mr. Unger and Mr. Aug apparently have abandoned the contention they advanced to the ABA Committee that they read the word "relationship" in the affidavits to mean any blood relationship, even though the debtors were a corporation and a limited partnership. _See_ ABA Statement, pp. 36-37.

Justice Andrew G.T. Moore, II of the Supreme Court of Delaware testified about another instance in which Mr. Unger filed a false affidavit with a court. (The ABA Committee had not learned of this instance during its investigation of Mr. Unger.) Justice Moore, Mr. Unger's co-counsel in the Freidco proceeding in Delaware, testified that Mr. Unger moved to disqualify Alton Tybout as counsel for the trustee in Freidco on the eve of trial. The basis for Mr. Unger's motion was that, unbeknownst to Mr. Unger or his client, Unit, Inc., Mr. Tybout had an associate, John A. Elzufon, in his law firm who had previously been associated with the law firm of Mr. Moore. This, Mr. Unger contended, created either an actual conflict of interest or an appearance of impropriety. Mr. Unger submitted an affidavit in support of this motion stating that he was unaware of Mr. Elzufon's presence in Mr. Tybout's firm when Mr. Tybout was appointed as trial counsel for the trustee in Freidco in August 1978. He also signed and filed the written motion to disqualify and a ten-page supporting brief. See Tr., Oct. 5, 1983, p. 148.

Justice Moore testified that in fact he had made Mr. Unger aware of Mr. Elzufon's relationship to Mr. Tybout's firm prior to Mr. Tybout's appointment in 1978 and that both Justice Moore and Mr. Unger had nevertheless agreed to the appointment of Mr. Tybout. See Tr., Oct. 5, 1983, pp. 150, 153-54, 156-57. Consequently, the statements in Mr. Unger's affidavit were untrue, and the motion to disqualify was based on facts presented to the court that were untrue. Justice Moore testified that he wrote a letter to Mr. Unger on January 30, 1980 reminding him of his previous knowledge of Mr. Elzufon's employment and urging him not to go forward with the motion to disqualify. Justice Moore later learned from Mr. Unger's associate, Michael Kohn, that Mr. Unger had recalled being informed about Mr. Elzufon's employment with Mr. Tybout's firm but would nonetheless proceed with the motion to disqualify. Justice Moore therefore withdrew from the case. Mr. Unger had Mr. Kohn prosecute the motion, which the District Court denied. See Tr., Oct. 5, 1983, pp. 151-52, 155-56, 158-59.*

IV. MR. UNGER'S TERMINATION FROM THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ("HUD").

> Despite Mr. Unger's previous denials, the record shows that he was fired as General Counsel of HUD because his superiors felt he was untrustworthy. As to the precipitating event, the record shows that Mr. Unger was significantly involved in raising an issue of Lucius Clay's conflict of interest and in securing an opinion that such a conflict existed, contrary to Mr. Unger's initial testimony on this matter.

Richard C. Van Dusen, former Under Secretary of Housing and Urban Development, testified that Mr. Unger was fired as General Counsel of HUD because he was so motivated by his self-interest that he could not be trusted to serve effectively in that position. Specifically, Mr. Van Dusen focused on an incident in which Mr. Unger had obtained a legal opinion that a conflict of interest precluded the selection of Lucius Clay as Chairman of the Board of FNMA, a position to which Mr. Unger himself aspired. Former Secretary of Housing and Urban Development, George C.

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* Mr. Unger testified that "I was embarrassed about the affidavit, as well, being in error, and I never appeared again in Wilmington." Tr., Oct. 5, 1983, p. 167; see also Tr., Oct. 6, 1983, p. 12.

Romney, has submitted a statement, dated September 26, 1983, to the Judiciary Committee stating his agreement with the written testimony of Mr. Van Dusen. See Exhibit J, attached hereto.

Mr. Van Dusen emphasized in his testimony that, although it might have been appropriate for Mr. Unger in other circumstances to have raised a question concerning a possible conflict of interest, it was inappropriate in this instance because (1) he raised this issue on his own initiative only after he had specifically asked to serve as Chairman of the Board and had been informed that Lucius Clay was to be appointed; and (2) he had been involved in the appointment of the members of the Board of FNMA and had never raised a question about possible conflicts of interest, including the appointment of Lucius Clay as a member of Board. See Tr., Oct. 5, 1983, pp. 172-74, 183-84, 186-88.

Mr. Unger's principal response to Mr. Van Dusen's testimony was that he did not write the conflict of interest opinion in question. Rather, he testified, the conflict of interest opinion was written by Karl Ruediger of the Civil Service Commission, as evidenced in Mr. Unger's view by a letter from then Assistant Attorney General William H. Rehnquist to Mr. Van Dusen, dated July 10, 1970. See Exhibit K, attached hereto. Indeed, Mr. Unger testified that the conflict of interest issue

> "was first brought to me, since HUD had oversight on whether or not there could be a conflict of interest for serving on the Board and also doing business with FNMA. I was on the Board of FNMA. I said I would not touch that with a ten-foot pole; that is not my responsibility. I turned it over to the Civil Service Commission. The Civil Service Commission came back with an opinion that it was a conflict. I was surprised that that was the ultimate conclusion, but it was their conclusion."

Tr., Sept. 30, 1983, p. 9 (emphasis added). Mr. Unger emphasized that the conflict of interest opinion "was not something of [his] making," *id*. at 11, and concluded that

Mr. Van Dusen had simply made a false allegation against him. Id., pp. 12-13.

Mr. Rehnquist's letter indicates, however, that Mr. Ruediger's opinion was based on "facts outlined by Mr. Unger in a letter to him dated June 9, [1970]." See Exhibit K, p. 1. Mr. Unger subsequently submitted to the Senate Judiciary Committee a letter written by Mr. Ruediger to Mr. Unger, dated June 19, 1970 (Exhibit L, attached hereto) which indicates that Mr. Unger had raised the conflict of interest question. It is also clear from Mr. Unger's letter of June 9, 1970 (Exhibit M, attached hereto), that Mr. Unger raised the conflict question as to Lucius Clay.*

Moreover, in contrast to Mr. Unger's initial testimony that he would not touch the conflict of interest issue with a ten-foot pole, Mr. Unger himself subsequently testified that he had met with three people from the Civil Service Commission on this issue and "explored the problem with them," telling them "that there could be a conflict of interest situation here." Tr., Oct. 5, 1983, p. 178. Irving Margulies, who worked for Mr. Unger at HUD and now works for him at the Department of Commerce, testified that he attended this meeting and that "the discussion was primarily directed to the propriety of General Lucius Clay serving with FNMA, and . . . whether his position with Lehman Brothers and his position on the Board of FNMA constituted such a conflict that it would preclude him from serving." Id. at 180-81; see id. at 182.

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* In response to questioning by Senator Specter, Mr. Unger agreed that he had outlined the facts to the Civil Service Commission but maintained that he had not rendered an opinion. Tr., Sept. 30, 1983, p. 27. Mr. Ruediger, however, did not see this distinction at the time, stating in his letter to Mr. Unger: "As stated in your letter of June 9, a conflict of interest question exists with regard to the following situations" one of which involved Lucius Clay. See Exhibit L, p. 4.

Mr. Van Dusen testified that, as a result of this incident, he and Secretary Romney asked Mr. Unger to resign. Ultimately, when Mr. Unger refused to do so, they obtained a letter from President Nixon terminating Mr. Unger from his position as General Counsel. Id. at 174-75. Mr. Unger disputed the contention that he was fired, testifying that he was relieved of his responsibilities by President Nixon at the urging of Senator Scott, who wanted Mr. Unger's successor, a person from Pennsylvania, to be confirmed. See Tr., Sept. 30, 1983, pp. 13-14; Written Statement of Sherman E. Unger, Sept. 29, 1983, p. 12. However, even Mr. Marguilies, who testified on Mr. Unger's behalf, indicated that Mr. Unger had been fired from his position at HUD. Tr., Oct. 5, 1983, p. 199.

V. RECEIPT OF LEGAL FEES IN BANKRUPTCY PROCEEDINGS WITHOUT PRIOR COURT APPROVAL.

Mr. Unger concedes that he received $12,046 in legal fees from the debtor in the Scioto Park bankruptcy proceeding without prior court approval.* He has testified, however, that shortly after payment of those fees, the court approved of them by approving of the monthly reports of the debtor, which indicated that the fees had been paid. See Written Statement of Sherman E. Unger, Sept. 29, 1983, p. 10; Tr., Oct. 6, 1983, p. 35; Tr., Oct. 5, 1983, pp. 17-18. The docket sheets from the Scioto Park proceeding through 1976, the year the unauthorized legal fees were paid, reflect the filing of the debtor's monthly reports but do not reflect any court order approving either the payment of the fees or the reports themselves. See ABA Statement, Exhibit 36. Nor has Mr. Unger to date produced any court order which approved the fees.*

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* As pointed out in my original written testimony, this concession itself contradicts the initial denial given by Mr. Unger to both the ABA and the Justice Department. See ABA Statement, p. 38.

VI. SUMMARY OF MISREPRESENTATIONS TO AND FAILURES TO BE FORTHCOMING WITH THE ABA COMMITTEE AND THE DEPARTMENT OF JUSTICE.

None of the allegations which were investigated by the ABA Committee or which have been raised before the Senate Judiciary Committee were brought to the attention of the ABA Committee or the Department of Justice by Mr. Unger, although the Personal Data Questionnaire and personal interviews with the nominee are designed to elicit such information.** In addition, Mr. Unger denied many of the allegations that were raised until we were able to confront him with evidence supporting them, at which point he changed his position. A number of these instances are summarized below.

> 1. Question 19 of the Personal Data Questionnaire asks whether the nominee has "ever been under federal, state or local investigation for possible violation of a criminal statute?" Mr. Unger responded no to this question. In fact he had been subject to a criminal

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* The Judiciary Committee has not yet been provided with several documents which would be useful to evaluate explanations Mr. Unger offered concerning certain of the allegations discussed above. The documents are as follows: (1) the audit letter Mr. Unger received from the IRS in March 1970, which preceded his filing of an amended 1968 tax return; (2) the IRS Intelligence Report on the criminal investigation of Mr. Unger, dated August 25, 1970; (3) the proposed order, which Mr. Unger testified that Mr. Kohn had prepared and which Mr. Unger filed with Judge Gartner during one of their July 1977 ex parte meetings; (4) the complete transcript from the conference or hearing in the Freidco proceeding on Mr. Unger's motion to disqualify Alton Tybout as counsel for the trustee; and (5) an IRS Report on Mr. Unger dated February 19, 1969.

None of the testimony or materials submitted during the confirmation hearings has changed the ABA's position on the allegations concerning Mr. Unger's termination from American Financial Corporation, see ABA Statement, pp. 40-46; Mr. Unger's attempt to have himself substituted as plaintiffs' trial counsel in the Donohoo litigation, see id., pp. 49-52; Mr. Unger's directly contacting opposing parties who were represented by counsel, see id. pp. 48-49, and Mr. Unger's improper interference with depositions, see id. p. 52.

** As noted above, the Justice Department sent Mr. Unger the Personal Data Questionnaire to fill out and requested that he send copies of his responses to the Justice Department and to the ABA Committee. See pp. 1-2 supra.

investigation by the Intelligence Division of the IRS in connection with his 1968 tax return.**

2. Question 20 of the Personal Data Questionnaire asks whether "a tax lien or other collection procedure [has] ever been instituted against you by federal, state or local authorities?" Mr. Unger answered no to this question. In fact, Mr. Unger was the subject of investigation by the IRS as to both his failure to report $40,000 in income and the "constructive income" issue on his 1968 tax return. Ultimately, Mr. Unger was required to pay $26,437.57 in additional taxes, interest, and penalties concerning both matters on his 1968 tax return.

3. Question 22 of the Personal Data Questionnaire asks whether the nominee has "ever been a party or otherwise involved in any other legal proceeding?" Mr. Unger did not include in his response to this question the action in Freidco in the federal district court in Delaware seeking injunctive relief to restrain Unit, Inc., Freidco, their officers, directors and attorneys, and Judge Gartner from, inter alia, further interfering with the Delaware court's jurisdiction over the Freidco proceeding. Both the temporary restraining order issued by Judge Balick and the preliminary injunction issued by Judge Stapleton clearly applied to Mr. Unger as Unit, Inc.'s attorney. See Statement of Paul Welsh, Oct. 5, 1983, Exhibits 6 and 7. Moreover, that action for injunctive relief was based largely on the impropriety of the ex parte order which Mr. Unger had procured from Judge Gartner.

4. Question 23 of the Personal Data Questionnaire asks whether the nominee has "ever been disciplined or cited for a breach of ethics or unprofessional conduct by, or been the subject of a complaint to, any court, administrative agency, bar association, disciplinary committee, or other professional group?" Mr. Unger responded no to this question, even though the U.S. Court of Appeals for the Third Circuit had rebuked him for his ex parte communications with Judge Gartner, stating that his conduct was "completely inconsistent with the Canons of Ethics." See ABA Statement, Exhibit 13, p. 13.

5. Similarly, Mr. Unger made no mention of the findings of fact adopted by bankruptcy Judge Balick in the same matter. Judge Balick stated, inter alia, that Mr. Unger's effort to secure the July 14, 1977 ex parte order from Judge Gartner was done

> "for the sole purposes of delaying and interfering with the due execution of this court's duly entered

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** In addition, Mr. Unger was the subject of a criminal investigation by Assistant U.S. Attorney Bernard J. Gilday, Jr. concerning his conduct in bankruptcy proceedings involving Unit, Inc. and Hillcrest Square, Ltd. Mr. Unger maintains that he was unaware of the fact that he was the subject of this investigation at the time he submitted his responses to the Personal Data Questionnaire.

> Order . . . and of inequitably imposing inconvenience and expense on the opposing litigants here, and of obtaining an unfair advantage in the proceeding before Judge Gartner, all of which effects have occurred."

See Statement of Paul P. Welsh, Oct. 5, 1983, p. 10, and Exhibit 9. Judge Balick added that "the Ohio ex parte Order was entered without notice or opportunity to be heard as to those affected by it, and without due process of law." Id. In oral argument on July 22, 1977 before Judge Balick, Mr. Unger himself noted that opposing counsel had raised the most "serious" and "grave" ethical questions abut his professional conduct, to which he wished to respond. See ABA Statement, p. 27; Exhibit 15, pp. 3-4.

6. Question 29 of the Personal Data Questionnaire asks for "any other information which may reflect positively or adversely on you, or which you believe should be disclosed in connection with consideration of you for nomination to the Federal Judiciary." Virtually every adverse matter discussed in the ABA's testimony or raised during the confirmation hearings should have been mentioned in Mr. Unger's response to this question. In particular, Mr. Unger should have disclosed the Third Circuit's statements about the impropriety of his ex parte contacts with Judge Gartner, as well as the findings of fact entered by Judge Balick stating that his actions in that matter were improper.

7. In response to Question 29, Mr. Unger did not mention that he had filed false affidavits in the Unit, Inc. and Scioto Park, Ltd. proceedings.

8. Similarly, Mr. Unger did not mention that Justice Moore had resigned as his co-counsel in Friedco because Mr. Unger persisted in pursuing a motion to disqualify counsel which was based on untrue factual representations in his affidavit.

9. In response to Question 29, Mr. Unger did not inform the ABA Committee or the Justice Department that he had been fired as General Counsel of HUD.

10. In response to the same question, Mr. Unger also did not inform the ABA Committee or the Justice Department of the existence of the exceedingly derogatory affidavits filed by Mr. Kreider and Mr. Berghaussen in the Donohoo litigation or of the fact that he had been fired by American Financial Corporation.

11. When the ABA Committee initially asked Mr. Unger why he had not filed an affidavit in the Donohoo litigation specifically denying the allegations in the affidavits of Mr. Berghaussen and Mr. Kreider, Mr. Unger stated that he had executed his affidavit before he had seen them, a position which he subsequently acknowledged was untrue. See ABA Statement, p. 42.

12. When the allegation that Mr. Unger engaged in ex parte contacts with Judge Gartner was brought to Mr. Unger's attention, he denied it. He then maintained that he had engaged in such contacts solely on matters of administration. See, e.g., ABA Statement, pp. 18, 27-28; Exhibit 4, p. 4. As noted above, however, Mr. Unger conceded in response to questioning by the Senate Judiciary Committee that his ex parte meeting with Judge Gartner and request for an ex parte order in July 1977 involved substantive, controverted matters of litigation.

13. In response to the allegation that he had obtained fees from debtors in bankruptcy proceedings without prior court approval, Mr. Unger stated "I at no time took any fees from debtors without prior court approval. Any allegation to the contrary is untrue and cannot be proven." See ABA Statement, Exhibit 4, p. 5. This allegation was ultimately proven and acknowledged by Mr. Unger.

14. When asked about his termination as General Counsel of HUD, Mr. Unger initially maintained that he had not been fired or terminated from that position. Nor did he ever inform the ABA Committee that Mr. Van Dusen and Secretary Romney had asked him to resign because they found him untrustworthy, in particular, because of his involvement in offering or obtaining an opinion that a conflict of interest precluded appointment of an individual to a position on FNMA to which Mr. Unger himself aspired.

15. When asked why he had signed two affidavits falsely stating that he had no relationship to the debtors he sought to represent in bankruptcy proceedings, Mr. Unger offered the explanation of Mr. Aug, who drafted the affidavits, that he construed the word "relationship" to mean "blood relationship." This response is incredible, since the debtors were businesses, and neither Mr. Unger nor Mr. Aug advanced it during the confirmation hearings.

16. When specifically asked about his difficulties with the IRS in 1970, Mr. Unger failed to inform the ABA Committee or the Justice Department that he had not reported $40,000 of income on his 1968 tax return, although he mentioned another, much less significant issue relating to his 1968 tax return.

* * * *

In conclusion, the record of these confirmation hearings supports the ABA's position that Mr. Unger is not qualified to be a Federal Circuit Judge by reason of lack of personal integrity and judicial temperament.

EXHIBITS

Exhibit A. - Letter from Jonathan C. Rose, Assistant Attorney General, to Brooksley Born, dated August 10, 1982.

Exhibit B. - Letter from Jonathan C. Rose, Assistant Attorney General, to Mr. Unger, dated August 10, 1982.

Exhibit C. - Letter from Mr. Unger to William T. Coleman, Jr., dated August 20, 1982.

Exhibit D. - Affidavit of Leon S. Forman, dated September, 1983, submitted to Senate Judiciary Committee.

Exhibit E. - IRS Report on Mr. Unger, dated April 15, 1971.

Exhibit F. - IRS Report on Mr. Unger, dated January 13, 1972.

Exhibit G. - Excerpts from Transcript of Mr. Unger's Testimony During Confirmation Hearings on October 5, 1983.

Exhibit H. - Affidavit of Paul W. Eggers, dated September 14, 1970.

Exhibit I. - Letter from Leonard L. Silverstein, of Silverstein and Mullens, to William R. Seaman, Esq., dated September 15, 1970.

Exhibit J. - Statement of George Romney, dated September 26, 1983, submitted to Senate Judiciary Committee.

Exhibit K. - Letter from William H. Rehnquist, Assistant Attorney General, to Richard C. Van Dusen, Under Secretary of the Department of HUD, dated July 10, 1970.

Exhibit L. - Letter from Karl Ruediger, Assistant General Counsel of the Civil Service Commission, to Mr. Unger, dated June 19, 1970.

Exhibit M. - Letter from Mr. Unger to Karl Ruediger, Assistant General Counsel of the Civil Service Commission, dated June 9, 1970, with enclosures.

Office of Legal Policy

Exhibit A

Assistant Attorney General

Washington, D.C. 20530

August 10, 1982

Ms. Brooksley Born
Chairperson, Standing Committee on
  Federal Judiciary
American Bar Association
1200 New Hampshire Avenue, NW
Washington, D.C. 20036

Dear Ms. Born:

We would appreciate having the formal report of your Committee on Sherman E. Unger who is under consideration for appointment to the United States Court of Appeals for the Federal Circuit.

Mr. Unger was born October 9, 1927, in Chicago, Illinois, and resides at 1815 Kalorama Square, NW, Washington, D.C. He attended Miami University (Oxford, Ohio), receiving a A.B. degree. He attended the University of Cincinnati College of Law, receiving a J.D. degree.

He is currently General Counsel of the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, D.C. 20230.

Sincerely yours,

Jonathan C Rose

Jonathan C. Rose
Assistant Attorney General

cc: William T. Coleman, Jr., Esq.

U.S. Department of Justice
Office of Legal Policy

Exhibit B.

Assistant Attorney General

Washington, D.C. 20530

August 10, 1982

Mr. Sherman E. Unger
General Counsel
U.S. Department of Commerce
Room 5870
Washington, D.C. 20230

Dear Mr. Unger:

You are among those who have been suggested to the Department of Justice for recommendation to the President for nomination to the Federal Judiciary. The Department's recommendations are based upon careful investigation and evaluation of your qualifications and background.

In order to expedite our investigation, it would be helpful if you would send us all of the information requested by the attached personal data sheet. In preparing your responses, please repeat the question to which each related and forward a copy to Ms. Brooksley Born, Chairperson, Standing Committee on Federal Judiciary, American Bar Association, 1200 New Hampshire Avenue, NW, Washington, D.C. 20036, and William T. Coleman, Jr., O'Melveny & Myers, 1800 M Street, NW, Washington, D.C. 20036.

This information is for the confidential use of the Department of Justice and the American Bar Association's Standing Committee on the Federal Judiciary.

Sincerely yours,

Jonathan C. Rose

Jonathan C. Rose
Assistant Attorney General

cc: Chairperson, ABA Standing Committee
on Federal Judiciary

GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

August 20, 1982

William T. Coleman, Jr., Esq.
O'Melveny & Myers
1800 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Coleman:

Pursuant to a letter from Jonathan C. Rose, Assistant Attorney General, enclosed is my ABA Personal Data Sheet with enclosures.

With kindest regards,

Very sincerely,

Sherman E. Unger
Sherman E. Unger
General Counsel

Enclosures

Exhibit C.

Exhibit D.

To: The Committee on the Judiciary
United States Senate

....

The following affidavit is submitted by Leon S. Forman, Esquire, of Philadelphia in support of the Statement and Position of the Standing Committee on the Federal Judiciary of the American Bar Association in opposition to the nomination of Sherman E. Unger as United States Circuit Judge for the United States Court of Appeals for the Federal Circuit:

Commonwealth of Pennsylvania:
: ss.
County of Philadelphia :

Leon S. Forman, being duly sworn according to law, deposes and says:

I am an attorney at law, admitted to the practice of law in the Commonwealth of Pennsylvania, and before the United States District Court in the Eastern District of Pennsylvania, and the Third Circuit Court of Appeals, as well as the Supreme Court of the United States. I am presently the most senior member of the law firm of Wexler, Weisman, Forman & Shapiro, P.C. I have been engaged in the practice of law for more than 40 years and have specialized in the fields of creditors' rights, bankruptcy, reorganizations and commercial law.

I was called by Pittsburgh counsel, Berkman, Ruslander, Pohl, Lieber & Engel, representing the Pittsburgh National Bank, a very substantial secured creditor, in a pending Chapter XII reorganization proceeding, Scioto Park, Ltd., in the United States Bankruptcy Court in Cincinnati, Ohio, to become associated with them and local counsel and to assist them in the further conduct of the case. Sherman Unger was co-counsel for the debtor, Scioto Park, Ltd. and was virtually in complete charge of its legal affairs as far as

I could determine during the time I was involved. My engagement commenced in the summer of 1977 and continued until the claim of the Bank was settled, approximately 3 years later and the reorganization proceeding was about to be brought to a conclusion.

During my involvement there was extensive, complicated and heated litigation between the Bank and Scioto Park before the Honorable Leonard Gartner, Bankruptcy Judge, in which both Mr. Unger and I participated with other attorneys. I understand that Judge Gartner is now deceased. Mr. Unger and I were almost continually opposed to each other during this proceeding until the matter concerning the Bank was eventually settled through negotiation.

During the many times we had contact in court, I found him frequently to be intemperate and sometimes abusive. There were a number of occasions when it was obvious that he was having private conversations with the court. This was evident when he was seen leaving the Judge's chambers just prior to the time set for hearings in the case, or from remarks made by the Court during the hearings.

Counsel for the Bank discovered during the course f the case that Mr. Unger was accepting counsel fees from the debtor while the proceeding was pending without prior application to and approval by the Bankruptcy Court after notice to creditors. Such payments were in violation of the Rules of Bankruptcy Procedure promulgated by the Supreme Court and the Bankruptcy Act. These incidents have been documented by the ABA Committee.

Counsel for the Bank also discovered during the course of the case that Mr. Unger had failed to disclose in his affidavit filed with the court in connection with his request for approval of his employment as counsel for the debtor-in-possession as required by the Bankruptcy Rules and the Bankruptcy Act, that he had a close relationship with the debtor (other than as an attorney) as he was one of the debtor's limited partners, the debtor being a limited partnership. In fact, his affidavit denied in effect he had such relationship. The ABA Committee has copies of the relevant documents.

Whenever Mr. Unger did not have his way in the litigation, he was intemperate in his dealings with other counsel. On a number of occasions he filed papers with the Bankruptcy Court requesting action by the Court without timely service of copies on opposing counsel or sufficient notice to enable such counsel to appear or to file timely answers.

I agree with the conclusion of the ABA Committee respecting his nomination as a Federal Circuit Judge and support their position in opposition.

Leon S. Forman

Sworn To and Subscribed
this day of September, 1983

Notary Public

Exhibit E.

Department of the Treasury

Internal Revenue Service
Washington, DC 20224

April 15, 1971 | CP:C:D 161-5478

Sharman Edward Unger
2650 Virginia Avenue, N. W.
Washington, D. C.

This supplements our report of February 19, 1969.

Our records show that income tax returns were timely filed for 1968 and 1969. There is no record of unpaid taxes or liens concerning these returns.

The returns for 1967, 1968, and 1969 were examined by our Audit Division with the following results:

1967. Agreed deficiency of $2,776.31; interest, $431.96; total of $3,208.27 paid December 24, 1970. Issues involved disallowance of a dependency exemption and certain itemized business expenses.

1968. Agreed deficiency of $20,748.01; interest, $1,477.57; negligence penalty, $1,037.40; total of $23,262.98 paid in two payments -- $16,988.99 on May 20, 1970, and $6,273.99 on December 31, 1970. Issues involved disallowance of a dependency exemption, disallowance of certain business expenses, and additional income from a finder's fee. An amended return was filed prior to closing of the examination with which taxpayer paid the $16,988.99 mentioned above. There remains an unagreed issue on the 1968 return ~~which~~ involves a proposal to add $136,666.67 to the tax-payer's income for additional finder's fees in regard to a stock transaction. This involves a highly technical question as to whether ~~there is~~, in fact, income, and if so, the amount. A District audit conference was held April 2, 1971, but nothing was resolved. If it is determined that the $136,666.67 is taxable income, a deficiency of $77,483.26, plus negligence penalty of $3,874.16 will be asserted.

1969. Agreed deficiency of $315.76; interest, $11.21; total of $326.97 paid December 23, 1970.

We will write you further concerning the 1968 audit.

Exhibit F.

Department of the Treasury

Internal Revenue Service
Washington, DC 20224
Date | In reply refer to:
Jan. 13, 1972 | CP:D 161-5478

Sherman Edward Unger
2650 Virginia Avenue, N. W.
Washington, D. C.

As a supplement to our report of November 15, 1971, attached is a copy of a Supporting Statement concerning the tax matters of this individual. This case was settled on December 28, 1971.

This completes our report.

Sherman E. and Polly Unger

Supporting Statement

I. ISSUES

1. Whether taxpayer realized ordinary income in the form of increased equity or property interest for services rendered co-investors in the amount of $136,667 under Section 61 of the Internal Revenue Code.
2. Value of "other property" received in an exchange under Section 351(a) recognized under Section 351(b) as a long-term capital asset under Section 1202 in the amount of $11,250. (New issue raised by the taxpayer for the Government.)

II. PROPOSAL OF SETTLEMENT

Issue No. 1 - That the Government concede.

Issue No. 2 - That the taxpayer concede.

Note: Inasmuch as the negligence penalty attaches to the entire dificiency (partial agreement not in dispute) the taxpayer concedes the penalty applicable to Issue No. 2.

III. FINDING OF FACTS - LAW AND ARGUMENT

General

Because of the complexities of the issue, along with the designation of "sensitive" to the case, a short recitation of the indirect facts to the issue but germane to the case is deemed appropriate. Because of the close proximity of the two issues it is believed more coherent and less involved to refer to the two issues as one. Mr. Sherman Unger, will hereinafter interchangeably be referred to as the taxpayer and Mr. Unger and Modern Talking Picture Services, Inc., will hereinafter be referred to as MTPS, Inc.

During the month of August 1968 while the examining officer was examining the returns of some other corporate taxpayers and related returns, it came to light that $40,000 was paid to the taxpayer "for right to acquire one-third of all the outstanding common stock of Motion Talking Picture Service, Inc., a Delaware Corporation for the the price of $27.00 per share" (see statements sent to Mr. J.T. Resor, Midwest Venture Capital Corporation, and Ohio Venture Capital Corporation dated June 11, 1965). These amounts were subsequently paid during the month of June 1968. Subsequent examination of the taxpayer's return for the year 1968 disclosed that the $40,000 was not reported by the taxpayer in the year under consideration.

Because of the omission of the income as determined by the District Director, the case was referred to the Intelligence Division of the office of the District Director, which branch after thorough investigation and study withdrew from the case and recommended that prosecution not be instituted(See Intelligence Report dated August 25, 1970.)

While the Intelligence Division was considering the case, the taxpayer filed an amended return in which he included the $40,000 as income less expenses and paid an additional tax of $16,988.99.

Upon further audit examination, after the Intelligence Division withdrew from the case, the office of the District Director determined that the taxpayer realized income from services to co-investors (in the same transaction that gave rise to the $40,000 payment) in the amount of $136,660.67 as recited below. In addition to the $40,000 item a finding was made on other small items and the negligence penalty of 5% was proposed on the deficiency along with the tax due, so that at the conclusion of the audit the taxpayer's deficiency on other than the issue in controversy was $20,748.01 in tax, and $1,037.40 negligence penalty, against which the $16,988.99 was paid on the amended return. Subsequently, the taxpayer paid the balance.

The taxpayer then protested to this Division as recited in Issue No. 1 the following:

Issue No. 1 and 2 - Finding of Fact

In the latter part of 1967, or the forepart of 1968, the exact date not a matter of record, Mr. Unger, the taxpayer, learned that the common stock of Modern Talking Picture Services, Inc., hereinafter referred to as MTPS, Inc., was available for sale by Rosalie M. Arlinghaus, widow of the former MTPS, Inc., and owner of substantially all the shares. A Mr. Eberle held a small amount of the stock.

The offering price of the stock was approximately $2,500.00. It is fairly well documented through the file and admitted by the taxpayer in conference that he was virtually without funds and a substantial line of credit was not available to him. He approached a Mr. Resor and a Mr. Taylor, who had substantial interests in Midwest Venture Capital Corporation and Ohio Venture Capital Corporation. According to the testimony, he recited to them the profit making history and potential of the MTPS business and convinced them that it was an excellent buy, but that he was without funds and that he desired to own one-third of the corporation after its acquisition. They agreed to work out the details of the acquisition.

On May 10, 1968, an offer was tendered to Mrs. Arlinghaus and Mr. Eberle by the taxpayer for all the shares to be purchased for $2,551,500. On May 31, 1968, they accepted the offer of Mr. Unger.

According to the offer, the exact terms were for the acquisition of 94,500 shares at $27.00 per share, or as an alternate, the acquisition of all the assets of MTPS, Inc., for the total amount of $2,551,500 in cash.

It was ultimately agreed to acquire the entire amount of the 94,500 shares. In order to accomplish this a corporation was formed under the name of Modern Media, Inc., as evidenced by the minutes of the meeting of June 7, 1968, which recited that Resor, Unger and Taylor (for Ohio Venture and Midwest Venture Corporations) subscribed to the 600 shares of common stock of Modern Media, Inc., for $150 per share, plus one-sixth hundredth (1/600) of the right to purchase all the outstanding 94,500 shares of Modern Talking Picture Service, Inc., for a full price of $27.00. Of this $90,000 capitalization, our taxpayer, Mr. Unger, contributed $30,000 for his 200 shares of the 600 shares issued. In order to raise the money to acquire the MTPS stock, Modern Media, Inc., effected a loss from the First National Bank of Cincinnati, Ohio, for approximately $2,100,000. In order to raise the balance Resor loaned the corporation $200,000.00 receiving a personal note, and Taylor, through Modern

Media and Midwest Venture Corporations loaned the corporation $100,000.00 each, and they in turn each received a note from the corporation. All three notes totaling $400,000.00 were subordinated to the loan of $2,100,000 secured from the First National Bank of Cincinnati, Ohio.

According to the prospectus filed with the Security & Exchange Commission on June 6, 1969, the "historical" net income of the corporation for the year ended June 30, 1968, was 50¢ per share on which a cash dividend of 8¢ per share was paid.

In the stock purchase agreement of June of 1968, between Ensor, Unger, Ohio Venture, Midwest Venture and Modern Media, there is a provision that no stockholders can transfer without consent of any other stockholders, the common stock of Modern Media unless he has offered his stock to Modern Media, the corporation and/or other stockholders and the offer has not been accepted. On August 27, 1968, the 94,500 shares of MTPS, Inc., stock held by Modern Media was split 4 to 1 so that there was then 378,000 shares. In the next month of September there was a sale of MTPS, Inc., debentures of $800,000.00 which was distributed to Modern Media who in turn paid The First National Bank the sum of $800,000.00 as a partial repayment on its loan of $2,100,000.

According to the statements made by Mr. Unger in conference in this Division, he stated that it was never his intention that the stock of MTPS, Inc., go public, but that his two co-investors, Resor and Taylor, prevailed as they could see a prospect of substantial profits from the stock if it was offered to the public. Accordingly, an underwriter was hired to draw up the prospectus and application to the Security & Exchange Commission.

According to the file and the statements made by the taxpayer in conference, the underwriter felt that it was detrimental to the permission sought from the Security & Exchange Commission to go public if the $400,000.00 of indebtedness showed as owing to Resor and the two Venture Corporations remained on the books, albeit, that it was clear that the $400,000.00 was subordinate to the primary obligation of The First National Bank. Accordingly, on December 3, 1968, by letter, Resor and Taylor (on behalf of Ohio Venture and Midwest Venture) tendered their respective notes for the total amount of $400,000.00 marked cancelled, and asked that the total amount be treated as tender as a contribution of capital. The net worth per books of Modern Media immediately following the surrender of the notes on December 3, 1968, was $465,000.00.

On December 4 and December 6, 1968, the stockholders and Board of Directors of Modern Media agreed to effect a "downstream" merger in which Modern Media would be merged into Modern Talking Picture Service, Inc., with the latter the surviving corporation. In order to effect the merger, 650 shares of capital stock of MTPS was exchanged for each share of capital stock of Modern Media. The stockholders in turn were distributed the capital stock of Modern Talking Picture Service, Inc. Accordingly, Mr. Unger, our taxpayer, received 126,000 shares of MTPS, Inc., common stock.

On June 6, 1969, a prospectus for permission to go public was filed with the Security & Exchange Commission. (See copy enclosed in the file.)

According to the statements of Mr. Unger in conference in this Division, the earnings of Modern Talking Picture Service, Inc., took a decided turn for the worst for the year 1969 and upon advice of underwriters the application for going public was withdrawn from the Security & Exchange Commission in November of 1969. On November 21, 1969, as evidenced by the Minute Book of that date, MTPS, Inc., was merged into the KDI Company, a conglomerate based in Cincinnati, Ohio. The details of the merger were that 1 share of KDI common stock would be exchanged for each 4 shares of MTPS common stock. According to the taxpayer in conference in this Division there was a restriction, however, upon the 50,400 shares that he received in the exchange in that he had to secure the permission of the Board of Directors of KDI for the sale or disposition of the KDI common stock.

In late 1970, or early 1971, the KDI Company experienced financial difficulties and is presently operating under a creditor's committee after filing a petition for reorganization under Chapter XI of the Bankruptcy Act. According to statements made in conference in this Division the stock sells for $1.50 to $2.00 per share if permission is secured from the corporation to sell such stock because of Security Exchange Commission's rules relating to "pooling of interest." As of January 4, 1971, the value of the total investment of all former stockholders in MTPS, Inc., was $187,500 (see page 6 of the Protest.)

Law and Argument

Upon receipt of the offers of acceptances dated May 31, 1968, of the taxpayer's
offer to purchase the MTPS stock from Mrs. Arlinghaus and Mr. Eberle, the tax-
payer and Messrs. Resor and Taylor (for the Venture Corporations) organized
Modern Media, Inc., and effected a transfer of their rights to acquire the MTPS,
Inc., stock, plus $150 in cash for each of the common shares of Modern Media,
which latter corporation had been organized for the actual purchase of the MTPS
common stock. Mr. Unger had sold to Messrs. Resor and Taylor (for the Venture
Corporations) two-thirds of his rights to the acquisition of MTPS stock for
$40,000, half of which was billed as acquisition of rights $20,000 and the
balance of $20,000 as expenses incurred. No part of the $40,000 was reported
as income on the original return filed by the taxpayer, but after the examina-
tion of his return was started an amended return was filed in which he reports
the sale of two-thirds of his rights for $40,000 less reimbursement costs for a
balance of a short-term capital gain of $36,556.85. In a subsequent audit of
this return the District Director determined that from the transaction $37,306.14
was for "services" in lieu of the above amount reported as a short-term capital
gain by the taxpayer on his amended return. The deficiency in tax plus negli-
gence penalty on this transaction was subsequently paid.

In addition to the above amount, the District Director determined that in this
same transaction he received $136,666.67 as "services to co-investors." The
District Conference Report through the uniform issue number (0061.09-00) label
this amount income under Section 61 of the Code. In addition thereto, the
examining officer proposes that this amount is within the purview of the last
sentence of Section 351(a) which reads -

> "For purposes of this section, stock or securities issued for
> services shall not be considered as issued in return for
> property."

The essence of the District Director's position is that the loans of $400,000.00
by Resor and the two Venture Capital Corporations were in substance contributions
of capital because the corporation was "thinly" capitalized. Because the tax-
payer was not required to put up an additional one-third, his one-third invest-
ment in the corporation was enhanced to the extent of the one-third of the
loans when considering that in substance they were capital contributions as
evidenced by their conversion to this category as paid-in capital on December 3,
1968. It is further argued in the preliminary determination that when the "thin
capitalization" doctrine is applied to the debt vs. equity facet of the issue
that a substantially disproportionate distribution of stock to the taxpayer was
received by Mr. Unger in payment of Mr. Resor's and Mr. Taylor's part of the
two corporations' obligations to the taxpayer. Section 1.351-1(b)(1) of the
Regulations is cited.

The so-called "thin capitalization" doctrine is fraught with substantial hazards
in litigation as are all issues in which substance is being argued over form.
Support for this doctrine finds its genesis in this venue in the case of Gooding
Amusement Company, Inc., 236 Fed. 2d. 159, 49 AFTR 1973, when the Circuit Court
of Appeals for the 6th Circuit (which would be the venue for our taxpayer) de-
cided in 1956 that notes in that case were in substance equity capital. It was a
strong decision for the Government and it was quoted and applied with great
force and effect. Then in the year 1960 the same Circuit Court of Appeals in
the case of Byerlite Corporation, 6 AFTR, 2d. 6068, in effect backed away from
its decision in Gooding Amusement Company, Inc., supra. (at least to some extent)
and decided in favor of the taxpayer. There followed various adverse decisions
to the Government of this "thin capitalization" issue such as in the case of
Toulisses (sp) vs. 1661 Corporation, 377 Fed. 28, 291, 19 AFTR 21 1413, CCA-5
(1067); and J.S. Biritz Construction Company, 367 Fed. 2d. 451, 20 AFTR 2d.
5801, CCA-8, (1967). As a consequence the doctrine of "thin capitalization" is
today highly litigated with its outcome in doubt.

But what appears to be even more detrimental to the successful litigation of this
case is that the Commissioner has to effect what amounts to a creation of income
over and above the $40,000 reported in order to give rise to an amount which was
omitted from taxation by the taxpayer. This facet of Federal income taxation was
dealt with quite forcibly in the case of Bolcoy vs. Commissioner, 2 AFTR 2d.,
5660, 258 Fed. 2d. 865, CCA-3, 1958. The opinion of the Court and its dictum
will be further discussed

The taxpayer, on the other hand, is quite vehement both in the conference and
the protest filed that the $40,000 received from Resor and Taylor (on behalf
of the two Venture Corporations) completely satisfied the "finder's fee" of
sale of rights reported as a short-term capital gain and that no further inci-
dent of taxation arose or is appropriate in the transaction. They direct our

attention to the affidavits of Mr. Resor and Mr. Taylor that they considered the $400,000.00 in notes as valid and binding obligations of Modern Media, Inc., and they fully expected to be repaid for such loans. Page 9 and again on Page 13 of the Protest, they state that the direction to the officers of Modern Media, Inc., in December of 1968, to transfer their $400,000.00 in loans to capital contributed had no bearing whatsoever upon their expectations of repayment in June of 1968 because it was not until December of 1968 that the underwriters proposed this action prior to MTPS, Inc., stock going public.

The thrust of the District Director's position is that Mr. Unger went into the proposition with Taylor and Resor with the understanding that he would eventually own one-third of the outstanding common stock of MTPS, Inc., without investment of dollars or credit, neither of which he had; and once having obtained this objective, which he did in our taxable year, there arose an incident of taxable income that must be taken into account. There is no question but that the $40,000 paid in cash as a finder's fee is taxable income. The tax has now been paid on this amount. The amount of $30,000 of this $40,000 received was invested in Modern Media, Inc., which after a downstream merger into MTPS, Inc., resulted in the taxpayer receiving one-third or 126,000 shares of the outstanding common shares of MTPS, Inc. When a very limited number of shares were sold subsequent to the year under consideration, capital gain was reported using as a basis the allocable part of the $30,000 invested.

Aside from the above finder's fee of $40,000, where is the necessary ingredients to fix an amount of taxable income for the year under consideration? The District Director maintains that the loans made to Modern Media were in substance equity capital and the taxpayer's investment was enhanced in the amount of $136,667.00. The Third Circuit Court of Appeals in the opinion of Halsey vs. Commissioner, supra, strongly mitigates against this creation of income when it states in its opinion--

> "But these benefits operated only to increase the value of the taxpayer's stock holdings; they could not give rise to taxable income within the meaning of the 16th Amendment until the corporation makes a distribution to the taxpayer or his stock is sold." Eisner vs. Macomber, 1900, 252 US 189 (3 AFTR 3020); Schmidt vs. Commissioner of Internal Revenue, CCA-3, 1954, 208 F. 2d 819 (45 AFTR 37).

Further, in this opinion, the Court in citing Ferro (sp) vs. Commissioner of Internal Revenue, 50 AFTR 2084, 2087, Third Circuit, 1967, 242 Fd. 838, 841, comments:

> "The application of that criteria (stated in the Ferro vs. Commissioner case) to the facts of this case compels the conclusion that in the absence of a direct promiary (sp) benefit to the taxpayer the Tax Court erred in holding the distribution in question taxable to him." (Underscoring supplied.)

However, the magnitude of the transaction is such that it is almost impossible to envision the situation where the Government would have absolutely no merit. For example, if MTPS, Inc., would have been successful in going public the taxpayer stood to gain between $1,500,000.00 and $2,000,000.00 on his $30,000 investment according to the speculation of the underwriters, who projected the MTPS, Inc., stock as selling between $12 to $16 per share.

But in the year 1969 the application to go public was withdrawn when the earnings of MTPS, Inc., turned downward. The subsequent trade of the MTPS, Inc., stock for KDI stock could eventually result in a very profitable transaction, but again this is speculation, that runs afoul of the pronouncement as set forth in Holsey, supra.

The representatives recognize that the Government does have some merit in that the taxpayer realized something more than just the $40,000 in securing the right to the acquisition of all the MTSP, Inc., stock on May 31, 1968. The question remains as to how to value this "right" to acquire all of MTPS, Inc., common stock. Solely for the purpose of settlement the representatives proceed down the line of the $400,000.00 in loans eventually enhancing the capital structure of Modern Media when the notes were cancelled by the other shareholders and converted to paid-in capital on the books of Modern Media, Inc., on December 3, 1968. For purposes of settlement there is recognized as enhancement of the taxpayer's investment as of December 3, 1968, as set forth in the written offer of settlement dated November 9, 1971, enclosed in the file. But the point is made quite forceably that the $400,000.00 in notes did not have a fair market value anywhere near the face amount as they were subordinated to a $2,000,000 loan with the First National Bank of Cincinnati, Ohio. Taking into account this undetermined face value of the notes, along with the fact that our taxpayer was a minority stockholder, along with the fact that the stock was subject to a restrictive agreement in that it was to be sold first to the corporation or other stockholders, a determination for a settlement is proposed in the amount of $41,250.00 as a value to be recognized. From this amount the $30,000 invested by our taxpayer in the capital stock is subtracted and leaving the value of the $11,250.00 which is to be recognized as "other property" received in the exchange under Section 351(b) of the Code and Regulations Section 1.351-2. For purposes of settlement, this, of course, is to be considered a capital asset held for a period of longer than 6 months, the holding period running from May 31, 1968 until December 3, 1968, the date when the notes were surrendered to the corporation and transferred on the books of Modern Media, Inc., from loans payable to paid-in capital.

IV. CONCLUSION

It is concluded that the offer be accepted as representing the value of the case when including the $40,000 "fee" already taxed and paid.

Exhibit G.

about this. I did not know it was an issue. I had to get two law firms to get their files out of warehouses. I have substantially more information than I did then, and I think I can be more helpful and more precise, and I would be pleased to do that.

Essentially, in 19--April 15, 1969, to be exact, I did my own return late at night and got it filed shortly before midnight. In December of 1969, I sold some stock that was the result of a merger of the upstream merger to which we referred when we talked about the constructive income.

Senator Metzenbaum. When was that, December '60-when?

Mr. Unger. In December '69,yes, sir.

Senator Metzenbaum. 1969.

Mr. Unger. Because I had rushed so hard to get my taxes done in '68, one of the things that I did do was to determine that in 1969 I was going to get an early start and I was going to get it worked out. Well, in January of 1969 I began to try to determine the basis for that stock which was the result of two mergers.

And in trying to determine the basis for the stock, I discovered that I had in fact had a sale of rights in 1968 and that that sale of rights was my basis. But it had not been included in my 1968 income tax return.

I discovered that, and in January of 1970, I revealed that to the then general counsel of the Department of Treasu

His name is Paul Eggers. I have an affidavit from Mr. Eggers to the effect that I did in fact reveal it to him, and he in turn revealed it to Martin Worthy, the then chief counsel of the IRS.

They advised me in January of 1970 to file an amended return, and I did that.

Senator Metzenbaum. When did you do that?

Mr. Unger. In January of 1970.

Senator Metzenbaum. You did it in January of 1970, you filed the amended return?

Mr. Unger. No, sir. No, sir. I advised Mr. Eggers and Mr. Eggers in turn advised Mr. Worthy.

I continued to work on my taxes. I was also very busy. I took them to Florida and determined in March that I needed to do an income averaging or should do an income averaging to get the best benefit.

What I then did was to come back and meet on April 2 with a tax firm called Silverstein and Mullens in this city to consult with them.

Silverstein and Mullens subsequently wrote a letter to my Cincinnati tax counsel confirming that they suggested that it may not in fact be a taxable event. I concluded that I did not want any outstanding issues; I did not want any debate. I was willing to pay the tax.

Silverstein and Mullens called in Arthur Anderson.

Senator Metzenbaum. That is correct. It could have been an error and be '69. But it certainly could not have been '70 because---

Mr. Unger. But nobody--there is nothing that you have read that said they conveyed that information to me.

Senator Metzenbaum. Oh.

Senator Specter. Did they?

Mr. Unger. No, not until after I filed my return, my amended return.

The actual audit did not commence, Senator, until probably July of 1970.

Senator Metzenbaum. Did you not just say that somebody contacted you in March of---

Mr. Unger. Wrote a letter, yes, sir. I am talking about when the actual audit started, the first time we got together, the first time I gave the auditor any papers.

Senator Metzenbaum. So that they did contact you before you filed anything.

Mr. Unger. I got a letter--yes, sir, that is true. They contacted me before I filed it, but I revealed it before I got their letter.

May I read from Mr. Egger's affidavit, one paragraph?

Senator Metzenbaum. Well, no. I would like Mr. Eggers to come here, if he wants to testify. I do not think this hearing should be conducted on the basis of affidavits. If

Ultimately the merged company merged into another company that went into Chapter 11.

Senator Metzenbaum. All right. Now, Mr. Unger, you said and have made the point very strenuously that you filed your tax return before you were ever checked, that you did it without any knowledge that you were being checked.

Mr. Unger. No, sir. I made the point that I revealed to the IRS before I knew that there was any audit. I got a letter from the woman proposing to audit me before the--you are talking about my amended return, are you not, sir?

Senator Metzenbaum. Pardon?

Mr. Unger. You are talking about my amended return?

Senator Metzenbaum. Amended return.

Mr. Unger. The point I was making is that I revealed that I had found this income to the general counsel of the Department of Treasury before I was notified that there was an audit. I was notified that there was going to be an audit before the amended return was filed, and I had advice from counsel to the effect that if I did not want to do that, there was a claim that I could make that it was not taxable.

Senator Metzenbaum. Now, you admit--I am sure you would admit that it is very critical to our inquiry as to whether you acted on your own to report the additional $40,000 or whether you did so only after the IRS started to check your return. Would you agree?

Mr. Unger. That is why I gave you Mr. Eggers affidavit.

Senator Metzenbaum. Pardon?

Mr. Unger. That is why I presented Mr. Eggers affidavit.

Senator Metzenbaum. Then, how would you respond to this language in the IRS report, page 5---

Mr. Unger. May I have a copy?

Senator Metzenbaum. I think you have a copy because it is certainly--it is the January 13, 1972 Internal Revenue Service report.

Mr. Unger. I have never seen it.

Senator Metzenbaum. You have never seen it.

"No part of the 40,000"--excuse me. I will read it to you.

Mr. Unger. Go ahead. That is all right.

Senator Metzenbaum. "No part of the $40,000 was reported as income on the original return filed by the taxpayer. But after the examination of the return was started, an amended return was filed in which he reports the sale of two-thirds of his rights for $40,000, less reimbursement costs for balance of a short term capital gain of $36,556.85."

Now, that is exactly contrary to your representation to this committee.

Mr. Unger. I do not believe it is, Senator. I believe I said I advised the general counsel of the Department of

Treasury in January of 1970.

Senator Metzenbaum. Well, now, let us talk about that advising now. Now, what he really says is that, "My name is Paul Eggers. I was appointed by the President as general counsel of Treasury on April 1, 1969, and I resigned on March 20, 1970 to be the Republican candidate for governor of the state of Texas.

"While I was in Washington, I became acquainted with Sherman Unger as general counsel of HUD. In December '69 Mr. Unger called me at my office at Treasury, inquiring about the tax aspects of the new capital gains provisions of the 1969 Tax Reform Act.

"He stated he was negotiating on a sale of capital stocks. I referred him to another office for this information. In January 1970, we attended a reception at the Federal Bar Building for Justice Tom Clark. Mr. Unger did not have a car, and I offered to take him home.

"We stopped on the way home at a club. In the course of visiting, I asked Mr. Unger if he obtained the information he needed on the tax law. In the course of our conversation he told me that he discovered that he had failed to include some income from the sale in his tax return, which he had filed at thelast moment on April 15, 1969.

"He did not state the amount or type of transaction. I advised him to file an amended return and include a letter

Exhibit H.

September 14, 1970

AFFIDAVIT

My name is Paul W. Eggers. I am a resident of Wichita Falls, Texas, and a member of the State Bar of Texas, having been admitted as a member in 1948. Most of my practice was in the field of Federal Taxation and I have been past Chairman of the Tax Section, State Bar of Texas. On April 1, 1969, I was appointed by the President of the United States as General Counsel of Treasury, which position I resigned on March 20, 1970. Presently I am the Republican Candidate for Governor of the State of Texas.

While I was in Washington I became acquainted with Sherman Unger, who was General Counsel of HUD. In December, 1969, Mr. Unger called me at my office in Treasury inquiring about the tax aspects of the new Capital Gains provisions of the 1969 Tax Reform Act. He stated he was negotiating on a sale of Capital stocks. I referred him to another office for this information.

In January, 1970, we attended a reception at the Federal Bar Building for Justice Tom Clark. Mr. Unger did not have a car and I offered to take him home. We stopped on the way home at a club. During the course of visiting, I asked Mr. Unger if he obtained the information he needed on the tax law. In the course of our conversation he told me that he had discovered that he failed to include some income from a sale in his tax return, which he had filed at the last moment on April 15, 1969. He did not state the amount or type of transaction. I advised him to file an amended return and include a letter of explanation stating the facts as to the reason for the oversight. Shortly after talking to Mr. Unger about his omission of income, I advised Mr. Martin Worthy, Chief Counsel of the Internal Revenue Service, of the fact that Mr. Unger had told me about his omission and that I had advised him to file an amended return. Mr. Worthy, as I remember, agreed that my decision was correct.

/s/ Paul W. Eggers

STATE OF TEXAS

COUNTY OF TARRANT

Sworn and subscribed to before me a Notary Public in and for the County of Tarrant, State of Texas, on the 14th day of September, 1970.

/s/ Dorothy R. Dutton

Exhibit I.

LAW OFFICES
SILVERSTEIN AND MULLENS
1776 K STREET, NORTHWEST
WASHINGTON, D.C. 20006

LEONARD L. SILVERSTEIN
RICHARD A. MULLENS
GERALD H. SHERMAN
PAUL F. SENNIG
WILMA E. VAN SCOYOC
CHARLES W. SCHOENEMAN
ALVIN C. KOCH
ARTHUR H. SCHREIBER
NICHOLAS P. DAMICO
ROBERT E. FALB
JERRY J. MCCOY
THOMAS J. SACAS
JAMES R. JONES
COUNSEL

TELEPHONE
(202) 833-8010

CABLE ADDRESS
"SILVERTAX"

September 15, 1970

William R. Seaman, Esquire
Frost & Jacobs
2900 DuBois Tower
511 Walnut Street
Cincinnati, Ohio 45202

Dear Bill:

Sherman Unger has asked that we review our files relative to issues respecting the tax treatment of Modern Media, Inc.

On April 2, 1970, Sherman, at luncheon, described the general nature of the transaction in question. Although Sherman appeared to assume that $40,000 less applicable expenses represented the taxable amount, and the transaction was ultimately reported in such manner in the amended return later filed, my colleagues and I felt that inquiry should be made to determine whether sufficient basis was afforded to treat the transaction in whole or in part in a nontaxable manner. More specifically, we inquired, and indeed suggested to Sherman that the following rationale could be advanced: All of the rights to purchase Modern Talking Pictures were constructively contributed to Modern Media, Inc. in a transaction not taxable to Sherman or to Modern Media by reason of section 351 of the Internal Revenue Code and that thereafter, and again constructively, Modern Media sold two-thirds of such rights to Messrs. Taylor and Resor, all as part of the same "section 351" transaction. We were, of course, aware of the fact that in applying section 351, any portion of shares received by a transferor, such as Sherman, for services rendered would not be subject to the nonrecognition provisions of that section of the Code.

Upon examination of the minutes of Modern Media, the invoices prepared and delivered by Sherman to Messrs. Taylor and Resor and under all the circumstances of the situation, we determined (following discussions with Messrs. Arthur Andersen and Company) that the transaction should be reported in the manner reflected in the amended return.

Sincerely,

SILVERSTEIN AND MULLENS

Leonard L. Silverstein

Exhibit J.

UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

In the Matter of the Nomination of
Sherman Unger to be Judge,
United States Court of Appeals for the Federal Circuit.

Statement of George Romney

My name is George Romney. I reside in Bloomfield Hills, Michigan. From early 1969 until early 1973, I was the Secretary of the United States Department of Housing and Urban Development.

I have read the attached statement of Richard C. Van Dusen submitted in connection with the consideration by the Committee on the Judiciary of the United States Senate of the appointment of Sherman Unger to be a judge of the United States Court of Appeals for the Federal Circuit.

I am familiar with the facts relating to Mr. Unger's service as General Counsel of the Department of Housing and Urban Development recited in Mr. Van Dusen's statement. In particular I am familiar with the events relating to the Chairmanship of Federal National Mortgage Association and the events surrounding the termination of Mr. Unger's service as General Counsel of HUD.

To the best of my recollection, the facts recited in Mr. Van Dusen's statement are correct.

George Romney
George Romney

September 26, 1983

Rec'd 9/27/83 1pm

Exhibit K.

Department of Justice
Washington, D.C. 20530

July 10, 1970

The Honorable
Richard C. Van Dusen
Under Secretary
Department of Housing and
Urban Development
Washington, D. C. 20410

Dear Mr. Van Dusen:

Your letter to me of July 9 reiterated the earlier request of Sherman Unger, General Counsel of the Department of Housing and Urban Development, for the opinion of the Department of Justice as to whether the provisions of the federal conflict of interest statute found in 18 U.S.C. 208 apply to the directors of the Federal National Mortgage Association. That section, in the cases in which it is applicable, makes criminally punishable the participation by an officer or employee of the Executive branch of the United States government or of an independent agency of the United States in any particular matter in which he has a financial interest. Mr. Carl Ruediger, Assistant General Counsel of the Civil Service Commission, on the basis of the facts outlined by Mr. Unger in a letter to him dated June 9, concluded that specified outside activity on the part of several of the directors of FNMA "establishes a conflict of interest" under Executive Order 11222, */ and would violate 18 U.S.C. 208. After the most careful review of the facts submitted by Mr. Unger, additional factual information furnished by FNMA, and material bearing on the legislative history of the Housing Act of 1968, I find myself obliged to differ from Mr. Ruediger's conclusion. I am of the opinion that the directors of FNMA are neither "officers or employees of the Executive branch of the United States Government" nor are they officers or employees of an "independent agency of the United States". This being the case, the necessary predicate for the application to them of 18 U.S.C. 208 is absent, and they are not subject to its provisions. Executive Order 11222 includes in its coverage "any officer or employee of any agency", and defines "agency" as "any Executive department or any independent agency or any government corporation"; I have likewise concluded that the directors of FNMA are neither officers nor employees of an "agency" within the terms of the Executive Order.

---

*/ This Executive Order implements the provisions of this statute, and is designed to prohibit action by government employees which would either result in, or create the appearance of, impropriety -- action such as using public office for private gain, giving preferential treatment to any person, or otherwise adversely affecting the confidence of the public in the integrity of the government.

The basis for my conclusion, set forth in greater detail hereafter, is that by the Housing Act of 1968 Congress reconstituted the then existing FNMA, assigning certain of its functions to the GNMA, created by the Act and described in the Act as a "wholly owned government corporation", and assigning other functions of the former FNMA to a reconstituted FNMA, created by the Act and described therein as "a government sponsored private corporation". Analyzed either in terms of statutory language or of function, the present FNMA is not a part of the Executive branch, it is not an independent agency of the United States, and it is not a government corporation. This conclusion is buttressed by the fact that the statutory provisions for the election of directors quite clearly contemplate, if they do not require, selection of directors who are bound to have nongovernmental interests which are affected by many of the actions which would be taken by the Board, and whose participation in Board activities could be seriously limited if the conflict of interest statute or Executive Order were held applicable to them.

Mr. Ruediger used the following language in reaching his conclusion that FNMA is within the language of both the statute and the order:

> ". . . FNMA is an entity in the Executive branch of the government which, although substantially controlled by private stockholders, is performing a federal function under significant governmental control so as to be a quasi-governmental organization."
>
> ". . . Section 705 of Executive Order 11222 which prescribes standards of ethical conduct for government officers, defines an "officer" as an "officer . . . of an agency" and "agency" is defined in the same section to include a government corporation which FNMA basically is."

While it is perfectly clear that FNMA is subject to a number of government controls, and while it may for some purposes be described as a "quasi-governmental organization", I do not believe that these facts are determinative as to whether it is covered by either the statute or the Executive Order.

Under 18 U.S.C. 208, the inquiry is whether FNMA is a part of the "executive branch", or whether it is "an independent agency of the United States"; the Executive Order, in addition to substantially similar language respecting the Executive branch and independent agencies, adds to its coverage any "government corporation". I believe it is reasonably clear from both the language of the Housing Act of 1968, and the legislative history of that Act, that FNMA falls within none of these three categories.

The status of FNMA at present is determined by the provisions of its 1954 Charter Act, 58 Stat. 612, as amended by Title VIII of the Housing Act of 1968, 82 Stat. 536. Prior to the extensive amendments affected by the 1968 Act, which became fully effective on May 21, 1970, FNMA was defined by statute as a "body corporate" in the Department of Housing and Urban Development (12 U.S.C. 1964 ed. 1717(a)), and it was listed in 31 U.S.C. (1964 ed.) 846 as a "wholly" owned government corporation". Prior to the 1968 revisions, FNMA performed three separate functions in connection with the federal housing assistance program: "Secondary market operations" in the mortgage industry (12 U.S.C. 1719), "special assistance" (12 U.S.C. 1720), and "management and liquidation" (12 U.S.C. 1721). The agency's Board of Directors consisted of the Secretary of Housing and Urban Development and four persons appointed by him, who were either officers or employees of FNMA, of the immediate office of the Secretary, or of some other department or agency of the federal government. 12 U.S.C. (Supp. III) 1723.

The 1968 amendments to the charter made sweeping and significant changes. The "special assistance" and "management and liquidation" functions were transferred to a newly created agency called Government National Mortgage Association (GNMA), while the "secondary market operations" were retained by FNMA. 12 U.S.C. (Supp. V) 1716(b). While the management of the newly created GNMA is completely under the control of the Secretary of Housing and Urban Development (12 U.S.C. (Supp. V) 1723), the management of FNMA was drastically altered. It now has fifteen directors, five of whom are appointed by the President, while the remaining ten are elected by the holders of the common stock of the corporation. The directors all hold office for a year, and all are subject to removal by the President for cause. Of the directors appointed by the President, at least one is to be from the home building industry, one from the mortgage lending industry, and one from the real estate industry. 12 U.S.C. (Supp. V) 1723(b).

The 1968 Act retained a substantial amount of control over FNMA in the Secretary of Housing and Urban Development. See, e.g., 12 U.S.C. (Supp. V) 1723a(h). The general counsel of FNMA advises us, however, that the United States no longer has any financial investment in FNMA.

The legislative history of these provisions of the 1968 Act clearly show the intent of Congress to reconstitute FNMA as an entity quite different from the one which had previously borne the same name. Indeed, the 1954 Charter Act provided that as soon as practicable provision should be made to carry out the secondary market operations of FNMA "by a privately owned and privately financed corporation". 12 U.S.C. (1964 ed.) 1718(g). House Rep. 1429, 83d Cong., 2d Sess., p. 19, explained this subsection as envisaging legislation which would provide for the transfer of "control and management of the secondary operations to the private owners of the outstanding capital stock."

President Johnson's Housing Message of February 22, 1968, which provided a substantial part of the impetus for the 1968 legislation, stated:

> "I propose legislation to transfer the secondary market operation of the Federal National Mortgage Association on an orderly basis to complete private ownership". Public Papers of the Presidents: Lyndon B. Johnson, 1968-1969, Book I, p. 248 at 260.

The House Committee Report on the Amendatory Act of August 1, 1968 (House Rep. 1585, 90th Cong. 2d Sess.) states that the "principal" change in the statutory provisions affecting FNMA

> "would be in fulfillment of the congressional intent expressed fourteen years ago in section 303(g) of the Federal National Mortgage Association Charter Act . . ." (At p. 68).

After explaining the functions and status of GNMA the report continues:

> "The other corporation, which will become entirely privately owned and which will operate the secondary market operations, will be known as the Federal National Mortgage Association (FNMA). The new FNMA would be a government-sponsored private corporation, regulated by the Secretary and would have a status analagous to that of the Federal Land Banks and the Federal Home Loan Banks." (At p. 69).

The regulatory powers of the Secretary mentioned in the preceding quotation are explained in the report as follows:

> "It is the intent of the Committee that the regulatory powers of the Secretary will not extend to FNMA's internal affairs, such as personnel, salary, and other usual corporate matters, except where the exercise of such powers is necessary to protect the financial interest of the federal government or is otherwise necessary to insure that the purposes of the FNMA Charter Act are carried out." (At p. 71.)

The Housing Act of 1968 provided that GNMA should "remain in the government" (12 U.S.C. (Supp. V) 1716b), and that it "shall be in the Department of Housing and Urban Development". GNMA is also listed as a "wholly owned government corporation" in 31 U.S.C. (Supp. V) 846.

Conversely, the Act of 1968 contains no provision retaining FNMA "in the government" nor specifying that it shall be in the Department of Housing and Urban Development. On the contrary, 12 U.S.C. (Supp. V) 1716b defines FNMA as "a government-sponsored private corporation", and it has been removed from the list of "wholly owned government corporations" embodied in 31 U.S.C. (Supp. V) 846. The 1968 Act expressly exempts FNMA from all of the provisions of Title V of the United States Code, dealing with government organization and employees, and specifically exempts it from Civil Service and Classification Laws except for purposes not here relevant.

On the basis of the foregoing statutory language and legislative history, it seems clear beyond argument that FNMA is neither a part of the "Executive branch" nor an "independent agency". On the issue of whether or not it is a "government corporation", so as to be within the terms of the Executive Order but not the statute, I have likewise concluded in the negative. The obvious difference in statutory treatment of GNMA (remaining in the government and the Department of Housing and Urban Development), on the one hand, and FNMA, on the other; the express reference to FNMA as a "government sponsored private corporation"; the removal by statute of FNMA from the list of "wholly owned government corporations"; the exemption of FNMA from all of the statutory provisions relating to government organizations and employees; and the fact that the majority of its directors are elected by stockholders, rather than appointed by the President, lead to the conclusion that FNMA is neither in fact nor in law a "government corporation".

The fact that the directors of FNMA are not full time public servants, but serve in much the same manner as outside directors of a private corporation so far as time is concerned, indicates that Congress might have significantly impaired the accomplishment of its intended purposes in the Housing Act of 1968 had it made FNMA a government corporation subject to federal conflict of interest statutes and Executive Orders. The provision for special representation on the Board of Directors from the home building industry, the mortgage lending industry, and the real estate industry suggests that these segments of the agency's clientele are intended to have special consideration in the deliberations of the Board of Directors. This notion is further implemented by the requirement of section 810(a)(3) of the Act, 12 U.S.C. (Supp. V) 1716, note, that the transition to the new privately owned FNMA would become effective only when not less than one-third of the corporation's common stock is owned by persons or institutions in those three industries. This is not to suggest that self-dealing by the directors is either invited or permitted, but it does indicate that at least three of the directors will be representatives of, and presumably financially interested in, industries inevitably affected by the actions of FNMA. Application of the stringent prophylactic provision of 18 U.S.C. 208 which Congress has applied to actual government officers could well be inconsistent with this form of representation on the Board of Directors of FNMA.

Ⓐ Needless to say, this conclusion does not in any way indicate that there are no ethical or legal restraints on the directors of FNMA. Both general corporate statutes and common law have traditionally imposed an obligation of fidelity and fair dealing on directors of non-governmental corporations, and the directors of FNMA are undoubtedly subject to such obligations. They are not, however, subject to the provisions of either 18 U.S.C. 208 or of Executive Order 11222.

Yours very truly,

William H. Rehnquist
Assistant Attorney General
Office of Legal Counsel

Exhibit L.

Ethics (Conflict) Generally

OGC Index Digest Office

GC:LEG 1

June 19, 1970

Honorable Sherman Unger
General Counsel
Department of Housing and
  Urban Development
Washington, D. C. 20410

Dear Mr. Unger:

This refers to your letter of June 9, 1970, which makes inquiry as to possible conflict-of-interest situations that relate to some members of the board of directors of the Federal National Mortgage Association (FNMA).

Before responding to your inquiry, it is necessary to set forth certain basic understandings. The FNMA was created by Federal statute but is not an executive agency as defined in 5 U.S.C. 105.[1] There are 15 members on the board of directors of FNMA, 5 of whom are appointed by the President of the United States and the remainder of whom are elected by the common stockholders in FNMA. Any member of the board of directors may be removed from office by the President for "good cause". The board, among other powers, is authorized ", [w]ithin the limitations of law and regulation", to determine the general policies which govern the operations of the corporation. In addition, the board selects and appoints the president, vice president, and other officers of FNMA as may be provided for in the bylaws.

The Secretary of Housing and Urban Development has general regulatory power over FNMA and is authorized to make "such rules and regulations as shall be necessary and proper to insure that the purposes of this subchapter [subchapter III of chapter 13 of title 12, "National Mortgage Associations] are accomplished." (12 U.S.C. 1723a(h).) One of the purposes of the subchapter is to "manage and liquidate federally owned mortgage portfolios in an orderly manner, with a minimum of adverse effect upon the home mortgage market and minimum loss to the Federal Government." (12 U.S.C. 1716(c).) In addition, the Secretary may examine and audit the books and financial transactions of FNMA and the corporation may issue no stock obligation, security or other instrument without the prior approval of the Secretary. (12 U.S.C. 1723a(h).) It is also pertinent that the Secretary of the Treasury controls the volume and rate of interest of FNMA borrowings and obtaining resources through the sale of mortgage-backed securities.

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[1] 12 U.S.C. 1723a(d)(2) provides that "Except as provided in this subsection [which saved retirement benefits], the corporation shall not be subject to the provisions of title 5 [of the United States Code]."

The basic understandings set forth above support the conclusion that FNMA is an entity in the executive branch of the Government which, although substantially controlled by private stockholders, is performing a Federal function under significant Governmental control so as to be a quasi-Governmental organization. By reason of this conclusion, each member of the board of directors of FNMA appointed by the President of the United States would qualify as an "officer" as defined in 5 U.S.C. 2104 in the absence of 12 U.S.C. 1723a(d)(2), footnote 1 *supra*. That is, such a board member meets all the criteria in section 2104 as he is required by law to be appointed to a civilian position in the executive branch by the President, is performing a Federal function under authority of law, and is subject to the supervision of the President while engaged in the duties of his office.[2]

While these Presidential appointees are not "officers" for the purpose of title 5 by reason of 12 U.S.C. 1723a(d)(2), the fact that they otherwise fully qualify under the criteria for officers is persuasive that they are officers in the executive branch for conflict-of-interest purposes. Section 208 of title 18 relative to acts affecting a personal financial interest refers to "an officer * * * of the executive branch". Section 705 of Executive Order 11222, which prescribes standards of ethical conduct for Government officers, defines an "officer" as an "officer * * * of an agency" and "agency" is defined in the same section to include a Government corporation which FNMA basically is.

We are not unaware of 42 Op. Atty. Gen. No. 11 (October 25, 1962) which held that the fact that directors of the Communications Satellite Corporation are appointed by the President of the United States, by and with the advice and consent of the Senate, was not determinative as to whether they are officers of the United States. The Attorney General, after examining the nature of that corporation and its board of directors, held that the board members were not officers of the

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[2] Supervision is established not only with respect to the Presidentially appointed members of the board of directors but with respect to all board members by reason of the President's express authority to remove any member of the board for "good cause" (12 U.S.C. 1723(b).) In addition, supervision is evidenced by the statutory controls over FNMA placed in the Secretary of Housing and Urban Development. (12 U.S.C. 1723a(h).)

United States. There are, however, two important conditions regarding that corporation which the Attorney General stressed and which are entirely different from the conditions with respect to FNMA and its board of directors.

First, the Communications Satellite Corporation was expressly declared "not to be an agency or establishment of the United States Government". (42 U.S.C. 731.) With regard to FNMA there is no such express exclusion and, as shown above, there are several indicia that support the conclusion that FNMA is a quasi-Governmental organization. Second, the Attorney General referred to the tenure and duties of the Communications Satellite Corporation's board of directors and concluded that they held a private, rather than a public, office. On the other hand the members of the FNMA have a different tenure as they occupy what are actually temporary (one year appointment) positions and may be removed at any time by the President for good cause. Moreover, their duties -- the directorship of what has been termed a "Government sponsored private corporation"-- are more Government oriented than private oriented. We are, accordingly, of the opinion that 42 Op. Atty. Gen. No. 11 is not here controlling.

With respect to the members of the FNMA board of directors who are not appointed by the President of the United States, there is little doubt that they are not officers in the Government by reason of the fact that they are not "appointed" as required under criteria such as appear in 5 U.S.C. 2104 and 29 Comp. Gen. 363, 366 and 37 Comp. Gen. 138. However, this does not mean that the absence of an officer status places these elected board members in a category in which there are no Governmental considerations of ethical conduct or means to control actual conflicts of interest or the appearance thereof. As shown hereinbefore, all board members perform what is essentially a Federal or public function. Moreover, in apparent recognition of the public function performed by those board members, Congress gave the President of the United States express authority to remove them from office (both appointive and elective office) for "good cause". It would be incongruous to hold that action by a Presidentially appointed board member which is proscribed by law, Executive order, or executive branch regulation and which would constitute "good cause" for the removal of such a board member, would not be "good cause" for the removal of an elected board member. There can be no double standard for comembers of a single board of directors such as exists in FNMA. While the manner of their entry on the board is different, their conduct as board members must be judged by identical standards.

We come now to the standards specifically applicable to the Presidential appointees on the FNMA board of directors and which, as explained above, are equally applicable under the Presidential control authority to the elected board members.

Section 208 of title 18 makes it a criminal offense for an officer of the Government to participate personally and substantially in his official capacity by approval, disapproval, or recommendation in a ruling or other determination or other particular matter in which he knows that he, his partner, or an organization in which he is an officer dr director has a financial interest.

Executive Order 11222 and the regulations of the Civil Service Commission pursuant thereto (5 CFR Chapter 735) prohibit an officer of the Government who is a "special Government employee"[3/] from any use of his office that is motivated, or appears to be motivated, by a desire for private gain for himself or any organization with which he has business or financial ties. Such an officer is also prohibited from using his office in any way to coerce, or to give the appearance of coercing, another person to provide a financial benefit to an organization with which he has business or financial ties. Furthermore, by reason of 5 CFR 735.301, under which the appropriate ethical conduct standards applicable to regular officers may be made applicable to "special Government employees", such an officer is prohibited from taking any action -- whether or not specifically prohibited -- which might result in, or create the appearance of using public office for private gain, giving preferential treatment to any organization, losing complete independence or impartiality of action, or affecting adversely the confidence of the public in the integrity of the Government. In addition, an officer is prohibited from having a direct or indirect financial interest that conflicts substantially, or appears to so conflict, with his duties and responsibilities as an officer of the Government.

As stated in your letter of June 9, a conflict of interest question exists with regard to the following situations:

---

3. A "special Government employee" is defined as an officer or employee who serves for not to exceed 130 days during any 365-day period under a temporary appointment either on a full-time or intermittent basis. The members of the FNMA board of directors serve under one year appointments (these are generally regarded a temporary for civil service purposes) and their service is intermittent.

-- Charles P. Landt, a Presidentially-appointed FNMA board member, is President of Cameron-Brown Company which (1) owns 6,989 shares of FNMA stock, and (2) was paid $273,931 during 1969 for servicing FNMA home mortgages.

-- Julian H. Zimmerman, a Presidentially-appointed FNMA board member, is President of Lumbermen's Investment Corporation which (1) owns 2,442 shares of FNMA stock, and (2) was paid $237,279 during 1969 for servicing FNMA mortgages.

-- Lloyd E. Clark, a Presidentially-appointed FNMA board member, is President of Alodex Corporation which, through subsidiaries, own 266 shares of FNMA stock.

-- Lucius D. Clay, an elected board member, is a senior partner in Lehman Brothers which is the sole owner of Lehman Commercial Paper, Inc., which was paid $245,233 during 1969 to market FNMA short-term discount notes.

The fact that some members of the FNMA board of directors are officers in private business concerns that earn substantial amounts by servicing FNMA mortgages or by marketing FNMA short-term discount notes establishes a conflict of interest under the standards set out in Executive Order 11222 and 5 CFR Part 735. While we are without jurisdiction to make conflicts interpretations under the criminal code (that is reserved to the Department of Justice), there is every reason to believe that if the payments described were continued there would be an obligation under 28 U.S.C. 535 to refer the matters to the Attorney General as information indicating a violation of 18 U.S.C. 208.

The above conclusions are based on the fact that FNMA board members control not only the general policies of the corporation but the officers of the corporation who arrange the business relationships with the private business concerns in which these board members hold positions. The financial-gain facet of such an arrangement is obvious and appearance of using public office for private gain is one that could very well adversely affect the confidence of the public in the integrity of the Government. We hasten to add that none of the foregoing implies intentional wrongdoing on the part of any individual. This is a case, as is so frequently the case in the area of ethical conduct, in which the conflict situation is created with no wrongful intent but the fact of its existence and its appearance are as damaging as though malice were present.

The ownership of FNMA by private business concerns in which some FNMA board members hold offices is far less serious than the direct financial profit situation discussed above. While one could argue that it is common place for members of private corporations to own stock in the corporation in which they serve the situation in Government is different. Using the rationale in 18 U.S.C 208, if the FNMA board members take any action in that capacity which affects the financial interests of the private business concerns in which they hold office, they may be in technical violation of the statute. Needless to say, as those private business concerns own FNMA stock the board members' official actions can not do other than affect the financial interests of those private concerns which are FNMA stockholders. Accordingly, the stock-holding matter is also contrary to the standards in the Executive order and 5 CFR Chapter 735.

I hope the foregoing will aid in clarifying the conflicts questions you have. If I can be of further assistance please let me know.

Sincerely yours,

Karl Ruediger
Assistant General Counsel

Exhibit M.

THE GENERAL COUNSEL OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D. C. 20410

June 9, 1970

Mr. Karl Ruediger
Assistant General Counsel
Civil Service Commission
1900 E Street, N. W.
Washington, D. C. 20415

Dear Mr. Ruediger:

This will confirm our telephone conversation of the instant date in which I advised that Mr. Charles Landt, whom President Nixon recently appointed as a member of the Board of Directors of the Federal National Mortgage Association, had asked my opinion concerning his conflict of interest problems, if any. I understand from the attached proxy statement that Mr. Landt is President of the Cameron-Brown Company, of Raleigh, North Carolina. While Mr. Landt individually owns no shares of FNMA stock, the Cameron-Brown Company does own 6,989 shares of such stock and in addition this Company is among the 900 companies that service FNMA home mortgages. I am advised that they service under uniform contract terms which apply to all other servicers and that during 1969 this corporation was paid, as servicing fees, $273,931.

In addition, I call your attention to the fact that another Presidential appointee, Mr. Julian Zimmerman, is President of Lumbermen's Investment Corporation of Austin, Texas, which owns 2,442 shares of FNMA stock and which was paid $237,279 by FNMA for mortgage servicing last year.

A third Presidential appointee, Lloyd Clarke, is President of Alodex Corporation which, through subsidiaries, owns 266 shares of the corporation's stock.

In addition, Lucius D. Clay, who was elected by the shareholders, is a senior partner of Lehman Brothers, which is the sole owner of Lehman Commercial Paper Incorporated, which was paid $245,233 to market FNMA short-term discount notes during 1969.

The conflict question appears to raise two classes of cases. First, where the member of the Board of Directors is appointed by the President of the United States and second, where he is elected by the shareholders. Due to the large amounts involved, I should appreciate your advice and counsel concerning the conflict of interests, if any, that each class of directors may have. I attach for your information a copy of the Federal statute authorizing FNMA to assume its quasi-private posture as well as a copy of the recent proxy statement which sets out the above referred to transactions on pages 6 & 7.

In summary I should like to point out that while FNMA has been said to have the same characteristics as a non-governmental corporation, there are still many Federal governmental controls and privileges which cause one to wonder whether it isn't really a continuing instrumentality of Federal government.

Among the Governmental controls are the following:

(1) The President of the United States appoints five of the fifteen Directors.

(2) Any Board member may be removed by the President for cause.

(3) The Secretary of HUD controls dividends paid on FNMA common stock and the FNMA borrowing ratio.

(4) The Secretary has "general regulatory power" over the FNMA and shall make such rules and regulations as may be necessary and proper to insure that the purposes of the charter act are accomplished.

(5) No stock, obligation, security, or other instrument shall be issued by FNMA without prior approval of the Secretary.

(6) The Secretary may require that a reasonable portion of FNMA's mortgage purchases be related to the goal for providing low and moderate income housing.

(7) The Secretary may examine and audit books of FNMA and require reports.

(8) The Secretary of the Treasury has control of the volume and rate of interest with respect to FNMA borrowings and obtaining resources through sale of mortgage-backed securities.

The special privileges accorded to FNMA (to a large extent peculiar to government) are numerous and significant:

(1) Access to the Treasury. FNMA has this opportunity up to a maximum of $2,250,000,000.

(2) Tax and general regulatory exemption. FNMA is exempt from taxes, other than Federal income and local real estate taxes.

(3) In general, FNMA is exempt from regulation by the Securities and Exchange Commission.

(4) FNMA is preferred by allowing institutions, in general, that are Federally controlled or regulated to invest without restriction in FNMA securities (obligations, stock, other).

(5) A Federal income tax privilege is contained in the Internal Revenue Code, with respect to FNMA common stock.

I trust this provides you with sufficient information and hope that I may receive your advice prior to the next scheduled meeting of the Board of Directors on June 23rd. Kindest regards.

Very sincerely,

Sherman Unger

Sherman Unger

Enclosures

[COMMITTEE PRINT]

COMPILATION OF THE HOUSING AND URBAN DEVELOPMENT ACT OF 1968

PUBLIC LAW 90-448
WITH RELATED DOCUMENTS

COMMITTEE ON BANKING AND CURRENCY
HOUSE OF REPRESENTATIVES
90th Congress, Second Session

AUGUST 1968

Printed for the use of the Committee on Banking and Currency

U.S. GOVERNMENT PRINTING OFFICE
[illegible] O WASHINGTON : 1968

Association shall be changed into and shall become one share of voting common stock, without par value, of such corporation.

(b)(1) The provisions of section 308(b) of the National Housing Act (as added by section 802(y)(7) of this Act) shall be applicable only to the extent that its provisions do not conflict with this subsection.

Ante, p. 539.

FNMA. Board of Directors. Transitional period.

(2) For a transitional period after the effective date established pursuant to section 808 of this Act, the board of directors of the Federal National Mortgage Association shall consist of nine persons. For a term expiring on the date of the first annual meeting of the corporation's stockholders, all members of the board shall be appointed by the Secretary of Housing and Urban Development. For a term beginning on such date, seven members of the board shall be appointed by the Secretary, and two members shall be elected by the common stockholders. For subsequent terms beginning prior to the termination of the transitional period, five members shall be appointed by the Secretary, and four members shall be elected by the common stockholders. For each term beginning prior to the termination of the transitional period, the Secretary shall appoint as a member of the board the president of the corporation. During the transitional period, the president of the corporation shall be appointed by the President, by and with the advice and consent of the Senate, and may be removed from office by the President for good cause.

(3) The transitional period referred to in paragraph (2) shall come to an end at such time as the board of directors shall find, with the approval of the Secretary, that not less than one-third of the corporation's common stock is owned by persons or institutions in the mortgage lending, homebuilding, real estate, or related businesses; but in no event shall it end sooner than May 1, 1970, or later than May 1, 1973.

(c) From the effective date established pursuant to section 808 and until the retirement of the last of the outstanding shares of its preferred stock, the Federal National Mortgage Association shall be deemed to be a wholly owned corporation for the purposes of the Government Corporation Control Act. Notwithstanding the foregoing provisions of this paragraph, the financial transactions of the Federal National Mortgage Association shall continue to be subject to audit by the General Accounting Office for such period as there may be outstanding obligations of the Federal National Mortgage Association which are guaranteed as to principal or interest by the Government National Mortgage Association.

59 Stat. 597. 31 USC 841 note. GAO audit.

(d) Those persons who are the officers and employees of the Federal National Mortgage Association immediately prior to the effective date established pursuant to section 808 shall become the officers and employees of the Government National Mortgage Association on such date. The Federal National Mortgage Association and the Government National Mortgage Association shall provide by contract for the conditions and methods under which and by which the Federal National Mortgage Association during the transitional period may employ those individuals who are employees of the Government National Mortgage Association on such effective date; and may provide by contract for the operation by either of such corporations of any of the functions of the other. The Secretary of Housing and Urban Development shall make every reasonable effort to place in other comparable Federal positions any individuals who are career or career-conditional employees of the Government National Mortgage Association on such effective date and who are subsequently during the transitional period neither employed by the Federal National Mortgage Association nor retained by the Government National Mortgage Association.

Federal National Mortgage Association
1133 15th Street, N.W., Washington, D.C. 20005

297400
6-70

Notice of Annual Meeting of Stockholders

MAY 21, 1970

The Annual Meeting of Stockholders of the Federal National Mortgage Association will be held in L'Enfant Plaza Theatre, 429 L'Enfant Plaza Centre, S.W., Washington, D.C. at 10:00 A.M. on Thursday, May 21, 1970, for the election of ten directors and for the transaction of such other business as may properly come before said meeting. Only stockholders of record at the close of business on April 1, 1970, are entitled to notice of and to vote at the meeting.

To facilitate your attendance at the Annual Meeting, we have arranged free bus service to L'Enfant Plaza Centre from 1156 15th Street, N.W., in downtown Washington (west side of 15th Street, N.W., across the street from the FNMA building). Return transportation from L'Enfant Plaza Centre to the FNMA building will also be provided. The schedule is as follows:

Leave 1156 15th St., N.W.—9:00 AM & 9:35 AM
Leave L'Enfant Plaza Centre—12:05 PM & 12:45 PM

Your proxy is important. Whether or not you plan to attend the meeting, we hope you will sign and return the enclosed proxy card to assure that your shares will be represented at this meeting. This will not prevent your voting in person at the meeting as your proxy may be revoked by you at any time before it is exercised. We would appreciate your informing us in the boxes provided on the proxy card whether you expect to attend the meeting so that we can provide adequate accommodations.

By order of the Board of Directors

Franklin J. Clifford

FRANKLIN J. CLIFFORD
Secretary

Dated:
Washington, D.C.
April 15, 1970

FNMA Headquarters Building

Proxy Statement

Annual Meeting of Stockholders May 21, 1970

This statement is furnished in connection with the solicitation by the management of proxies for the 1970 Annual Meeting of Stockholders of the Federal National Mortgage Association.

Shares may be voted cumulatively. They may be voted if the holder is present or represented by proxy. When proxies in the accompanying form are returned properly executed, the shares represented thereby will be voted at the meeting, but a stockholder giving a proxy may revoke it at any time before it is exercised.

At the Annual Meeting of Stockholders, action will be taken on the election of ten directors and such other business as may properly come before the meeting.

At the present time, there are nine directors, seven of whom were appointed by the Secretary of Housing and Urban Development and two of whom were elected by the stockholders. It has been determined by the board of directors that not less than one-third of the corporation's common stock outstanding on January 2, 1970, was owned by persons or institutions in the mortgage lending, home building, real estate, or related businesses. Pursuant to section 810(b)(3) of Public Law 90-448, the corporation's "transitional period" will come to an end, and the transitional board of nine directors will be replaced by a board of fifteen directors, upon the approval of this finding by the Secretary of Housing and Urban Development (but not before May 1, 1970). The Secretary will approve such finding prior to the Annual Meeting on May 21, 1970, and the stockholders will at that meeting elect ten directors. The President of the United States will appoint five directors, of whom one each must be from the home building, mortgage lending, and real estate industries.

Shares Outstanding and Entitled to be Voted at Meeting

Stockholders of record at the close of business April 1, 1970, may vote at the Annual Meeting to be held May 21, 1970. The total number of shares of common stock of the corporation outstanding on the record date and entitled to be voted was 2,050,632 shares. There is no other class of stock outstanding.

Nominees for Election as Directors

It is intended that proxies in the accompanying form will be voted at the Annual Meeting for the election as directors of Messrs. Allan Oakley Hunter, Wm. B. Ross, Philip N. Brownstein, Lucius D. Clay, Joseph P. Hayden, Walter W. Heller, John E. Krout, John M. O'Mara, L. Roy Papp, and Robert H. Pease, for terms ending on the date of the 1971 Annual Meeting of Stockholders. If for any reason one or more of these nominees shall be unavailable as a candidate when the election occurs, the proxies will, in the absence of contrary instruction, be voted for the election of any of the other nominees or for a substitute nominee or nominees to be selected by a Proxy Committee composed of Messrs.

Hunter, Ross, and Unger. There is shown below as to each of the nominees named: his principal occupation, the period during which he has served as a director, and the number of shares of the corporation's stock owned beneficially by him on April 1, 1970.

Allan Oakley Hunter

Allan Oakley Hunter has served as director since January 20, 1970, and has been President of the corporation since January 17, 1970. During the previous 5 years, he was a partner in the firm of Hunter, Adams & Hobbs, attorneys, of San Francisco, California, a partner in the firm of Hunter & Price, attorneys, of Newport Beach and Fresno, California, and Chairman of the California Housing and Community Development Commission, Sacramento, California. He owns no shares of the corporation's stock.

Wm. B. Ross

Wm. B. Ross, who has served as director since September 1, 1968, has been the Deputy Under Secretary for Policy Analysis and Program Evaluation of the U.S. Department of Housing and Urban Development, Washington, D.C., since February 13, 1966. From 1964 to 1966, he was Assistant Chief, Fiscal Analysis, of the U.S. Bureau of the Budget. He owns no shares of the corporation's stock.

Philip N. Brownstein

Philip N. Brownstein has served as director from March 3, 1963 to February 28, 1969, and since May 15, 1969. He is Counsel to the firm of Parsons, Tennent & Zeidman, attorneys, Washington, D.C. He was previously the Federal Housing Commissioner and an Assistant Secretary of the U.S. Department of Housing and Urban Development. He owns no shares of the corporation's stock.

Lucius D. Clay

Lucius D. Clay has been Senior Partner of Lehman Brothers, investment bankers, of New York City, since 1963. He owns no shares of the corporation's stock.

Joseph P. Hayden

Joseph P. Hayden, who has been a director since May 15, 1969, has been President of The Midland Company, Cincinnati, Ohio, for more than five years. He owns no shares of the corporation's stock.

Walter W. Heller

Walter W. Heller, who has served as director since September 1, 1968, is Regents' Professor of Economics of the University of Minnesota, Minneapolis, Minnesota. He was previously the Chairman of the U.S. Council of Economic Advisers. He owns no shares of the corporation's stock.

John E. Krout

John E. Krout has been Senior Vice President of the Philadelphia Saving Fund Society of Philadelphia, Pennsylvania, since 1966. From 1959 to 1966, he was Vice President of the Society. In 1964, he was also President of the Philadelphia Mortgage Bankers Association. He owns no shares of the corporation's stock.

John M. O'Mara

John M. O'Mara has been a General Partner of W. E. Hutton and Company, investment bankers and brokers, of New York City since 1965. He owns no shares of the corporation's stock.

L. Roy Papp

L. Roy Papp, who has served as director since May 15, 1969, has been a partner in the firm of Stein, Roe & Farnham, investment counsellors, Chicago, Illinois, for more than five years. He owns no shares of the corporation's stock.

Robert H. Pease

Robert H. Pease has been Senior Vice President of Draper and Kramer, Inc., of Chicago, Illinois, for more than five years. He owns no shares of the corporation's stock. Draper and Kramer, Inc., owns 220 shares of the corporation's stock.

Nominees for Appointment as Directors

President Nixon has named Messrs. Lloyd E. Clarke, Charles P. Landt, Sherman Unger, Paul A. Volcker, and Julian H. Zimmerman as the persons he will appoint to be directors of the corporation for terms ending on the date of the 1971 Annual Meeting. There is shown below as to each of such persons: his principal occupation, the period during which he has served as a director, and the number of shares of the corporation's stock owned beneficially by him on April 1, 1970.

Lloyd E. Clarke

Lloyd E. Clarke, who has served as director since September 1, 1968, has been the President of Alodex Corporation, of Memphis, Tennessee, since 1969. For more than five years prior to 1969 he was President of the Clarke Company, Ltd. of Des Moines, Iowa. From January 1968 to January 1969, he was also the President of the National Association of Home Builders. He owns no shares of the corporation's stock. Alodex Corporation, through subsidiaries owns 268 shares of the corporation's stock.

Charles P. Landt

Charles P. Landt has been President of the Cameron-Brown Company, of Raleigh, North Carolina, since 1968. He was previously Executive Vice President of that company. He owns no shares of the corporation's stock. The Cameron-Brown Company owns 6,989 shares of the corporation's stock.

Sherman Unger

Sherman Unger, who has served as director since February 12, 1969, has been the General Counsel of the U.S. Department of Housing and Urban Development, Washington, D.C., since February 7, 1969. From 1956 to 1969, he was a partner in the firm of Frost & Jacobs, attorneys, of Cincinnati, Ohio. He owns no shares of the corporation's stock.

Paul A. Volcker

Paul A. Volcker, who has served as director since February 24, 1969, has been the Under Secretary for Monetary Affairs of the U.S. Department of the Treasury, Washington, D.C., since January 20, 1969. From 1965 to 1969, he was Vice President of the Chase Manhattan Bank, New York City. From 1963 to 1965, he was Deputy Under Secretary of the Treasury. He owns no shares of the corporation's stock.

Julian H. Zimmerman

Julian H. Zimmerman has been President of the Lumbermen's Investment Corporation of Austin, Texas, since 1960. He owns no shares of the corporation's stock. Lumbermen's Investment Corporation owns 2,442 shares of the corporation's stock.

Remuneration of Directors and Officers

The following table sets forth the remuneration paid by the corporation during 1969 to those directors whose aggregate direct remuneration exceeded $30,000, to the three highest paid officers whose aggregate direct remuneration exceeded $30,000, and to all officers and directors as a group:

Name of Individual or Number of Persons	Capacities in which Remuneration was Received	Aggregate Direct Remuneration
Raymond H. Lapin*	Director and President	$ 37,591
Robert Newton Reid	Vice President and General Counsel	$ 30,734
Arthur C. Hemstreet	Vice President and Treasurer	$ 30,559
29	All Directors and Officers as a Group	$405,641

Mr. Lapin's incumbency terminated on December 2, 1969.

Annuities for Retired Employees

Section 309(d)(2) of the FNMA Charter Act provides that any officer or employee who is employed prior to the end of the transitional period, and who, immediately prior to such employment, was subject to the Federal Civil Service Retirement Law shall continue to be subject to such Law so long as his employment by the corporation continues without a break in the continuity of service. During 1969, each officer and employee subject to this provision contributed 6.5 percent of his base pay into the Civil Service Retirement Fund, and the corporation contributed 7.1 percent of the aggregate base pay of all such officers and employees into such Fund. These employees are not covered by the Social Security System with respect to this employment. This payment by the corporation totalled $483,831 in 1969. The Civil Service Retirement System is so constructed that, under current law, there can be no residual liability of the corporation with respect to services performed during 1969.

The corporation established during 1969 its own retirement plan which supplements the Social Security System for those employees not covered by the Civil Service Retirement Law. This plan does not provide for employee contributions, and it is integrated with the Social Security System in a manner approved by the Internal Revenue Service. With respect to 1969, FNMA's total contribution to such plan was $56,145.

The following tables show the amounts of annuity payable upon retirement at normal retirement age under each system, based on average annual earnings and years of participation as indicated.

Federal Civil Service Retirement System

Assumed Average Annual Earnings*	Years of Participation**			
	10 Years	20 Years	30 Years	40 Years
$ 5,000	$ 813	$ 1,813	$ 2,813	$ 3,813
10,000	1,625	3,625	5,625	7,625
15,000	2,438	5,438	8,438	11,438
20,000	3,250	7,250	11,250	15,250
25,000	4,063	9,063	14,063	19,063
30,000	4,875	10,875	16,875	22,875
35,000	5,688	12,688	19,688	26,688
40,000	6,500	14,500	22,500	30,500
45,000	7,313	16,313	25,313	34,313

**Average annual base pay for highest consecutive three years of coverage by system.*

***Includes all service for which credit is granted under Civil Service Retirement System.*

FNMA Retirement System For Employees Not Covered By Civil Service Retirement System

(Not including Social Security benefits)

Assumed Average Annual Earnings*	Years of Participation**			
	10 Years	20 Years	30 Years	40 Years
$ 5,000	$ 625	$ 1,250	$ 1,688	$ 1,938
10,000	1,415	2,830	3,788	4,288
15,000	2,415	4,830	6,413	7,163
20,000	3,415	6,830	9,038	10,038
25,000	4,415	8,830	11,663	12,913
30,000	5,415	10,830	14,288	15,788
35,000	6,415	12,830	16,913	18,663
40,000	7,415	14,830	19,538	21,538
45,000	8,415	16,830	21,163	24,413

**Average annual salary for highest consecutive five years of last ten years prior to retirement.*

***Plan became effective January 1, 1969.*

Transactions with Officers and Directors

The corporation has transactions on a continuing basis with the Federal Housing Administration (FHA) and the Government National Mortgage Association (GNMA), both of which are within the U.S. Department of Housing and Urban Development (HUD). During 1969, the corporation paid $30,874,000 to FHA, principally from the escrow accounts of mortgagors, as mortgage insurance premiums; FHA paid the corporation $76,891,000 in return for assignments of defaulted mortgages and conveyances of properties (acquired by foreclosure and otherwise) under the terms of its mortgage insurance policies; and GNMA paid the corporation $2,881,000 for services under the Intercorporate Functional

Agreement between GNMA and the corporation. Mr. Ross is the Deputy Under Secretary for Policy Analysis and Program Evaluation of HUD. From March 1 to October 2 of 1969, he was also the Acting Federal Housing Commissioner and, as such, was the operating head of the FHA. Mr. Unger is the General Counsel of HUD and the General Counsel of GNMA.

During 1969, the corporation borrowed various sums from time to time from the U.S. Department of the Treasury; the highest amount of indebtedness at any time was $303,250,000. The corporation paid interest on such borrowings, at rates of from 6⅛ to 6⅝ percent per annum, in the total amount of $3,244,138. Mr. Volcker is the Under Secretary for Monetary Affairs of the Treasury Department. (These borrowings were repaid prior to July 1, 1969, and such borrowings are not anticipated in the future).

The Cameron-Brown Company of Raleigh, North Carolina, and Lumbermen's Investment Corporation of Austin, Texas, are among the 900 companies that service the corporation's home mortgages. The named companies service under uniform contract terms applying to all other servicers. During 1969, the corporation paid, as servicing fees, $273,931 to the Cameron-Brown Company and $237,279 to Lumbermen's Investment Corporation. Mr. Landt is President of the Cameron-Brown Company, and Mr. Zimmerman is President of Lumbermen's Investment Corporation.

The corporation regularly markets its short-term discount notes through four dealers, one of which is Lehman Commercial Paper Incorporated, of New York, New York. All of these dealers are compensated by commissions at the same rate. During 1969, the corporation paid $245,233 to Lehman Commercial Paper Incorporated, as such commissions. The partnership of Lehman Brothers, of which General Clay is Senior Partner, is the sole owner of Lehman Commercial Paper Incorporated.

Other Matters to be Acted Upon at the Meeting

As of the date of this statement, the management knows of no business other than that described herein which will come before the meeting. Should other business be properly brought up, it is intended that proxies in the accompanying form will be voted thereon in accordance with the judgement of the person or persons voting the proxies.

The corporation will pay all costs of this solicitation of proxies. Solicitation will be made by mail, and officers and regular employees of the corporation may also solicit proxies by telephone or personal interview. The corporation expects to request brokers and nominees who hold stock in their names to furnish this proxy material to their customers and to solicit proxies from them, and will reimburse such brokers and nominees for their out-of-pocket and reasonable clerical expenses in connection therewith.

By Order of the Board of Directors

Franklin J. Clifford

FRANKLIN J. CLIFFORD
Secretary

Washington, D.C.
April 15, 1970

Mr. COLEMAN. I did want to point out that the procedure leading up to the ABA's investigation. When the Justice Department decides to consider a particular person for a judicial position, it is the Justice Department that sends the personal data questionnaire to the particular person, that questionnaire was developed jointly by the Justice Department and by the American Bar Association, and it is my understanding that Attorney General Bell played a prominent part in the development of that questionnaire.

The Attorney General asks the nominee to send a copy of the responses to the questionnaire to him, a copy to the chairperson of the ABA judiciary committee, and a copy to the appropriate circuit representative on the ABA committee.

I say that only because at some time during the previous testimony I had the feeling that some members of this committee thought that perhaps we were officious intermeddlers, that we had gotten into a process which we were not invited into by the Attorney General of the United States.

Senator HATCH. I can only speak for myself, Mr. Coleman. I did not think you were.

Mr. COLEMAN. And I think every President since President Eisenhower has thought that this was a proper way to proceed.

Senator HATCH. Well, if you think those are bad, you ought to see the ones the Judiciary Committee has come up with.

Ms. Born, where are you licensed to practice law, just for my information?

Ms. BORN. In both the State of California and the District of Columbia. I practice in the District of Columbia.

Senator HATCH. I just wanted that for the record.

Go ahead, Mr. Coleman.

Mr. COLEMAN. I thought that we should point out that, even though Mr. Unger had testified that the only people who have testified against him are from Wilmington and that nobody has come in from Cincinnati or Washington, D.C. to oppose him, if you will read the footnote on page 3 of my statement, I am pretty sure you will recall that other people testified against Mr. Unger besides those from Wilmington.

Now, the first thing is the improper ex parte contacts. As we indicated to you, during our investigation various lawyers reported to us that Mr. Unger did engage in ex parte contact with judges, and we submitted to you the names of three persons who had so informed us.

We were able to establish what I think is a pretty clear record with respect to Mr. Unger's ex parte contacts with Judge Gartner. Although at the beginning of our investigation there was some conflict, I think that, based upon written documents and Mr. Unger's testimony, the following facts have been established beyond doubt.

One, Mr. Unger did engage in one or more ex parte meetings with Judge Gartner. Two, during one of those ex parte meetings, it was Mr. Unger who, on his own initiative, asked Judge Gartner to reverse a previous ruling which had been decided against Mr. Unger's client. I think it is clear that, whether Mr. Unger was called by the judge or whether Mr. Unger dropped in to see the judge, Mr. Unger, has finally conceded in his testimony that it was he who brought up the subject of trying to reverse Judge Gartner's previous order and trying to affect adversely the proceedings in Delaware.

Senator SPECTER. Can you give us a citation on that, Mr. Coleman?

Mr. COLEMAN. Yes, I can. If you will look at my supplemental testimony on page 7, if you look at exhibit 8 to our initial testimony, and if you look at the transcript of the October 6, 1983, hearing pages 43 to 45, you will see that, and I will supply you other page references.

Also, if you look at page 7 of my supplemental testimony where I say, "Mr. Unger also admitted in his testimony that he had initiated the request, see transcript October 5, 1983, page 169, and transcript, October 6, 1983, page 30."

So it is clear that regardless of who placed the telephone call or initiating the meeting, the conversations which went to substance initiated by Mr. Unger. It is also clear that Mr. Unger filed an application for reconsideration and a memorandum of law. You recall that when the Judiciary Committee asked Mr. Unger about the memorandum of law, he conceded that it involved a matter of substance.

Now, until this moment, it was not clear to me whether, assuming that Judge Gartner made the call, Mr. Unger had the written application and memorandum when he went over to see the judge. I have never been able to get a straight answer on that.

On page 7 of Mr. Unger's supplemental statement, which I just got today, you will note that Mr. Unger says, "At this meeting, Judge Gartner directed me to draft an application for reconsideration and a previous application to consolidate the Unit, Inc., and Freidco proceedings before him in Ohio." Mr. Unger said, "I left the judge's chambers, returned to my office to draft the application and supporting memorandum of law."

So even if you accept that description of what happened, it means that after he talked to the judge and the judge said, "File an application, file a memorandum," Mr. Unger left the judge's chambers, went back to his office, and drafted the application and wrote an eight-page memorandum.

Now, I will leave it to you to determine from your own trial experience, Chairman Hatch and Senator Specter, the amount of time it would take to draft such documents. In any event, Mr. Unger then took that application and the memorandum back to the judge, once again without ever notifying opposing counsel.

As I said before, it is also now clear, because Mr. Unger concedes it, that those papers did involve a substantive, controverted matter in litigation, not a matter involving the administration of the debtor's estate, as Mr. Unger had originally contended.

Even Mr. Aug, the dean of the bankruptcy bar, testified that the one thing which you could not discuss ex parte with bankruptcy judges even before 1978 was controverted matters of substance.

So it is clear that based upon the admitted facts, there was an ex parte conversation which, by every rule of the game, was improper and a violation of the rules of ethics.

Now, as I said, it really does not make any difference who placed the call to set up the meeting. But even on that issue, there are three pieces of evidence indicating that it was Mr. Unger who asked for the conference with Judge Gartner.

One, Judge Gartner himself so testified in Delaware. Second, the brief which was filed by Mr. Unger in the third circuit says that he was the one that requested the conference. Third, Justice Moore, testified that to the best of his knowledge, it was Mr. Unger who placed the call to set up the meeting with Judge Gartner.

Senator SPECTER. Where do you have that testimony of Justice Moore, Mr. Coleman?

Mr. COLEMAN. That testimony is cited on pages 12 and 13 of my supplemental statement. If you look at the transcript of the October 5, 1983 hearing, pages 142 and 143, and page 146.

But as I said before, Senator Specter, who placed the call is irrelevant, because even if the judge placed the call, Mr. Unger admits that he brought up the matter of substance.

As evidence to the contrary, you have the affidavit of Judge Gartner's secretary, whose previous affidavit, said nothing as specific as what she put in the affidavit that you read today. In her previous affidavit she says only that the judge often called conferences on matters of administration.

Senator HATCH. Mr. Coleman, as I have read it, Mr. Unger does not admit that he initiated the conversation. You have made the statement throughout the testimony he admits that he did this. He does not admit he did this. He admits he submitted a memorandum which, by necessity, anybody would have to say was substantive.

Mr. COLEMAN. No. He says that he was the one who said, "Judge, that the only way we can avoid what is happening in Wilmington, Del., is if you would issue an order which, in effect, would reverse your earlier decision that these proceedings should not be consolidated in Ohio."

Senator HATCH. Now, as I recall it, and maybe I am wrong, and I will look it over again, but it seemed to me he admitted that he laid out the facts, but I do not think he——

Mr. COLEMAN. He said that he was the one who brought up the subject and said, "Judge, what you have to do here is to revoke your earlier order and issue an order which says the two proceedings should be consolidated."

Senator HATCH. Now, is that on pages 145 to 146 of the October 5 testimony or where would you find that? It would be easy enough to find out what he said. Do you have a copy of it?

This is Justice Moore's dialog between 143 and 145.

Senator SPECTER. At page 143, I asked him the question.

Senator HATCH. You asked Justice Moore or Mr. Unger?

Senator SPECTER. It is Justice Moore. Page 143. "It is my best recollection, Senator, that Mr. Unger told me that he had raised the point with Judge Gartner initially."

And then I pressed on at 145 at the bottom, "Justice Moore, to be absolutely certain, and it is repetitious but are you certain that Mr. Unger said that he initiated the meeting with Judge Gartner?"

Senator HATCH. Now, I am not disputing the facts. I am saying that does not say that Mr. Unger said that.

Mr. COLEMAN. I am saying that I will show you in the record where Mr. Unger says that he was the one who told the judge that he should revoke the earlier order and that he brought this subject up.

Senator SPECTER. Mr. Coleman, on page 146, and this is the point I was coming to, Justice Moore is not quite so sure. He says, "Well, let me say, Senator, I cannot be certain that he said he initiated the meeting as such but he certainly initiated the subject."

Mr. COLEMAN. Yes.

Senator SPECTER. So you have two lines of contention. One is you say it is conclusive that Mr. Unger initiated the subject.

Mr. COLEMAN. Yes. I will show you testimony where Mr. Unger says that he was the one who brought up the subject.

Senator SPECTER. But as to initiating the meeting, it is not quite so conclusive in the evidence.

Mr. COLEMAN. What I am saying is that I have three pieces of evidence that he actually initiated the subject.

Senator HATCH. But, Mr. Coleman, bringing up the subject is a far different thing from what you have been saying that he——

Mr. COLEMAN. No, I think I have an obligation——

Senator HATCH. He admits he brought up the subject. There is no question.

Mr. COLEMAN. Page 169 of the transcript of October 5, 1983, Mr. Unger's testimony. Mr. Unger: "We discussed the application for reconsideration. If that is a substantive matter, that is what is established." Senator Hatch: "But who initiated that? You or the judge?" Mr. Unger: "I told the judge that I could think of nothing that could be done unless there was an application for reconsideration filed, and he directed me to file one."

Senator HATCH. I do not quite interpret that the same way you do. The way I interpret it is the judge invited him over, assuming you accept his and Miss Buerk's testimony, which apparently you do not. But if you did accept their testimony, the judge invited him over, started to discuss these matters with him and basically he said "we"—meaning the judge and he—discussed the application for reconsideration. If that is a substantive matter, then that is what is established.

Mr. COLEMAN. Well, let me try again. I will keep on until I finally convince you. In Sherman Unger's testimony of October 6, 1983, page 30——

Senator HATCH. I would not have interpreted it as stringently as you have.

Mr. COLEMAN. He states on page 30, "I said, 'There isn't much that you can do, Judge. There was a motion to consolidate a year and a half ago and you overruled it.'" Then he continued, "So I said 'The only thing I knew would be to reconsider that order.'"

Senator HATCH. If you read up above, talking about the judge, "He was a little unhappy about the fact" that he thought that 71 percent of that building was really property before him, and essentially he said what am I going to do.

Mr. COLEMAN. Yes.

Senator HATCH. So Mr. Unger said:

> I said, there is not much that you can do, Judge. There was a motion to consolidate a year and a half ago, you overruled it. We talked some more and he asked some more questions. It became apparent to me that the attempt to influence the judge negatively on my client's conduct had, instead of having that, had gotten him

> concerned about their finances and whether or not they were going to be able to reorganize under this administration. So I said the only thing I know would be to reconsider that order.

Mr. COLEMAN. Yes.

Senator HATCH. Now, in retrospect I suppose you could suggest that that was improper. However, on the other hand he is discussing with the judge who says, "What am I to do?" It is as much as saying, "Well, the only way you could resolve it is to reconsider your order," and that is just an honest response. That is not saying, "You should reconsider your order."

Mr. COLEMAN. In addition, look at the brief of appellant, which is exhibit 17 to the initial ABA testimony, page 9. This is the brief filed by Mr. Unger in the third circuit. He says:

> During the conference, counsel for Unit, Inc., inquired as to whether Judge Gartner might entertain reconsideration of his order of January 7, 1976, denying consolidation of the Freidco case with Unit. Judge Gartner told counsel to file a strong application, and I will give it some thought.

And then he said he filed the application.

So I think that the evidence, when you look at it——

Senator HATCH. If you resolve it against Mr. Unger in the way you are doing, I guess you could take that point of view. I think you could resolve it the other way, too.

Mr. COLEMAN. That is one of the issues that you will have to determine. We have supplied the citations to the record, and we think on that record it is clear that there was an ex parte, conversation on a matter of substance; namely, what to do to change the effect of a trustee who had been appointed in Wilmington, Del., that it was Mr. Unger who brought up the subject and suggested that the judge undo his 1976 decision and consolidate the two proceedings.

Also, we now know that after that conversation, Mr. Unger went back to his law offices, drew the application and the memorandum, and then went back to the judge, without ever calling opposing counsel.

He says that the judge, after looking at those pages, said, "Draw me a strong order." Mr. Unger says that he then called his associate, and had the order drawn and brought over, which gave him another opportunity to call the lawyers on the other side and say, "You'd better get over here, the judge is thinking about doing something."

The judge did not use Mr. Unger's proposed order, but he issued another order. I have checked, and to the best of my knowledge, Mr. Unger never served the application or the memorandum on opposing counsel even after he got the judge's order.

Senator SPECTER. How do you know that, Mr. Coleman?

Mr. COLEMAN. I know that because I asked Mr. Welsh, who testified in these hearings and he told me that. I asked Justice Moore, and he told me that. They said that the only way they got the copy of the application and the memorandum was by going back to the bankruptcy court's files. That is how they got it. The only thing they were ever served with was a copy of the judge's actual order.

Senator SPECTER. So they were not served with a copy of the memorandum——

Mr. COLEMAN. Memorandum or the application. The only thing they got was the judge's order, and Justice Moore said that that was the only thing that he served on the opposing parties. He did not serve the application or the memorandum.

Senator HATCH. The point I have raised here is not really a matter of debating the evidence. It is simply the question of whether Mr. Unger, as you say, admitted the wrongdoing, and that is my point. I do not think he has admitted it.

Mr. COLEMAN. As I read the record, he did. Of course, he will be up here to testify, and I think you ought to ask him that question. Was he the one that initiated the question of revoking the order or not.

Senator HATCH. Why do we not ask him right now?

Mr. UNGER. That was a procedural response, Mr. Chairman. I did suggest that the only option I could think of that the court had was administrative to reconsider his earlier ruling.

Senator HATCH. But that was in response to his question, "What should I do?"

Mr. UNGER. That is correct, and he instructed me to draft a strong application and give it to him. We did not talk about the substance or the content of the application or of the legal memorandum.

Senator HATCH. You did not discuss the substantive content of either, but you did submit it?

Mr. UNGER. That was a procedural decision.

Senator HATCH. Now, the other side is saying they should have gotten copies of those submittals.

Mr. COLEMAN. Yes.

Senator HATCH. They were submitted to the judge. They should have been submitted to the other people. Is there any reason Mr. Moore should have had that at that time?

Mr. UNGER. At that point when we were dismissed, Judge Gartner had the application and memorandum already rejected, and the draft order, and I did not know what he was going to do with it. I did not know what he was going to do with it until I received a copy of the order.

Mr. COLEMAN. Ask him did he ever serve the application——

Senator SPECTER. Wait a minute, Mr. Coleman. Let us pursue the question.

Senator HATCH. Let me just ask one other question on that. When you left his office, then, did you know he was going to accept it or did you think he was going to accept your order or your memorandum?

Mr. UNGER. I had no idea what he was going to do. I know he expressed an interest in the order. He did not like the order that was brought over.

Senator HATCH. You did not bring it over yourself?

Mr. UNGER. No. Mr. Kahn brought a rough draft over. I had no idea what he was going to do or whether he would accept the application. He simply said draft a strong application and bring it to me.

Senator SPECTER. Mr. Unger, are you saying that you considered it a procedural issue when you responded to Judge Gartner that you would submit an application for him to change his order?

Mr. UNGER. No; I asked whether he would consider an application to reconsider.

Senator SPECTER. Well, when the discussion between you as counsel and Judge Gartner as the judge concerns reconsidering his decision on consolidation, are you saying that that ex parte discussion goes to procedure and not substance?

Mr. UNGER. I am saying, Senator Specter, that when you look at the canons the court has and you look at the disciplinary rules a lawyer has, there is an exception in the lawyers' disciplinary rules to the standards set by a judge who may legally have an ex parte conference if he believes it is legal. And I am saying in my response that I will submit this afternoon that at that point the only issue was administration and procedure.

Senator SPECTER. Well, what is the basis for your statement that it is only administration and procedure when the subject matter is to change an order as to consolidation?

Mr. UNGER. The subject matter was would he consider the application. He did not say that he would consider the application. He did not say that he could consolidate. I did not ask him to consolidate. I drafted what he told me to draft.

Senator SPECTER. Which was an application to consolidate.

Mr. UNGER. An application to reconsider his earlier order.

Senator SPECTER. An application to reconsider his earlier order and then if reconsidered, to consolidate.

Mr. UNGER. I do not believe it went that far. I would have to pull it out. I believe he called for briefs on whether it should be consolidated. I believe the court called for briefs.

Senator SPECTER. Well, Mr. Unger, it seems to me that a fair interpretation of what you were discussing with Judge Gartner was a change in his decision on the issue of consolidation. I frankly do not understand the line of distinction that you are drawing.

If you are saying that it was procedural because you were merely discussing a procedure as to filing an application, or, if you are saying it was tentatively only because he had not said that he would reconsider or he had not said that if he reconsidered he would then consolidate, I do not see the logic of that position.

Those are lines so fine, I want to tell you candidly, that I do not see them. The thrust of what your discussion was, as I understand it, and I want you to know what is on my mind so you can respond to it, because I think this is a very important matter, that the thrust of the conversation which you had with the judge at that point appears to me to be an effort by you to get him to change his mind on the consolidation issue, which has very significant substantive import in the course of the litigation.

Mr. UNGER. Senator Specter, with all due respect, I have been here 5 days and I have not had an opportunity to make an opening statement. I would really appreciate the opportunity to make my surrebuttal from beginning to end on this point.

Senator SPECTER. Mr. Unger, I think that is a fair request. I think that the procedures here, and I commend the chairman for his valient efforts, are an attempt to get at the truth, and if you want to take the question in a different context that's fine. But I do want you to know that that issue is very much on my mind.

Mr. UNGER. I intend to address it this afternoon if I am given the opportunity.

Senator HATCH. You will be given it.

Senator SPECTER. Before you go on, Mr. Coleman, to finish up what is on my mind, Mr. Unger, I also want you to take up the issue of what opportunity you had to notify the other side, and what notice you gave them in the interim. But you can do that as you choose.

I also think you are entitled to some notice and a chance to reflect on the question and not to be questioned in a relay mode here. I do think you are entitled to that.

Mr. UNGER. Thank you.

Senator HATCH. Mr. Coleman.

Mr. COLEMAN. I would like to try to demonstrate why this was such an important issue. The judge in the Delaware proceeding had Freidco before him, which was a limited partnership in which Unit, Inc. was the general partner.

As long as a trustee was not appointed, it meant that the general partner would be administering the estate and therefore would be getting fees and other benefits, whereas if a trustee were appointed, for the debtor, the trustee would do the administration.

That issue had been litigated in Delaware with Mr. Unger present for anywhere from 4 to 8 months, and after all that tough litigation, it was decided that there should be a trustee.

Also, in the Unit, Inc. proceeding in Cincinnati there had been litigation as to whether the proceedings should be consolidated. Once again, that was tough litigation. Lawyers on both sides were present, and the judge originally ruled that there should be no consolidation.

Now, I think that the two gentlemen who came in from Pittsburgh made a point similar to the point I was trying to make to you, Senator Hatch—that it makes a difference whether you leave the debtor in possession and his lawyer, as opposed to an independent trustee and truly independent counsel running the estate.

And you see what happened. Because you did not have an independent trustee, you had the lawyer who, at one time, had represented Unit, Inc., before it went bankrupt taking positions which could be adverse to the interest of the creditors and the interest of the shareholders.

Similarly, when were saying that nobody was hurt by those false affidavits, I tried to tell you that creditors could be hurt or the limited partners could be hurt because their interests could be adverse to that of Unit, Inc., the general partner. And I think the testimony you heard earlier today demonstrates why the Federal judge ought to have before him accurate evidence of the attorney's relationship to the debtor.

In any event, I think that, with respect to the ex parte conversations, have laid out the undisputed facts we in our supplemental testimony. The only thing that could be in dispute is who placed the first telephone call, which is irrelevant. Though I think that issue does not make any difference, even on that issue there is some evidence that Mr. Unger was the one who initiated the meeting.

I know that both you, Mr. Chairman, and Senator Specter had the privilege, before you started serving the public as Senators, of trying lawsuits and being in the pit. The one thing that I think every lawyer feels is that you cannot write briefs, try a case, and have all the debate back and forth, and then have one of your opponents go to see the judge and make additional arguments or ask for additional relief when you are not there.

This is not just a lawyers' technicality. This goes to the heart of the adversary system, and we think that it does raise a very serious issue concerning not only Mr. Unger's conduct as a lawyer but his potential conduct as a judge. If he thinks that what he did as a lawyer was within the rules of the game, I just leave it to you to determine how comfortable litigants before him will be if they think that he will conduct himself the same way as a judge as we believe he conducted himself before Judge Gartner when he was a lawyer.

Senator SPECTER. Well, Mr. Unger said that he thought he went too far. He conceded that in his testimony.

Mr. COLEMAN. Yes.

Senator SPECTER. So it is a somewhat different question, Mr. Coleman. Your contention is that he has really disqualified himself from being a judge, because of what he did, even if he now concedes that he knows that ex parte conversations are improper.

Mr. COLEMAN. Well, frankly my problem in part is that Mr. Unger's concession demonstrated, Senator Specter, with all due respect, that you were always a much better lawyer than I was. With all my questioning of Mr. Unger, I could not get that concession out of him. He always took the position that he had done nothing wrong, and finally when you pressed him, he admitted it was wrong. Obviously that is something you have to weigh, and if that were the only problem, then I could see——

Senator SPECTER. Mr. Coleman, that is part of what I am getting to. It is a question of what is the consequence.

Mr. COLEMAN. Yes.

Senator SPECTER. And I have another question for you. How many of these ex parte conversations do you think this record establishes?

Mr. COLEMAN. Well, I think it establishes beyond doubt the ex parte conversation with Judge Gartner. In fact, if you believe Mr. Unger's statement on page 7, there were two conversations in the same day. He said he went over to see the judge, they discussed it, the judge said, "Do the application."

Mr. Unger went back, did the application and memorandum, and he went back to the judge again. So that is two ex parte meetings on the same day. We also pointed out to you in the record that there was another instance in which he talked privately to the judge when there were other lawyers were in court, a lawyer said, "Was that about this case?" And Judge Gartner said, "No, Mr. Unger and I were talking about another case."

Senator SPECTER. How do we know that they were not talking about another case on that one?

Mr. COLEMAN. What I am saying is that there was, in the court room, an ex parte conversation going on between the judge and Mr. Unger.

Senator SPECTER. But a conversation is not ex parte, in violation of the rule, if it is not on the subject of the litigation, is it?

Mr. COLEMAN. My understanding is—well, let us put it this way. Well, there are some ladies in the room so I cannot give you one hypothetical.——

Senator SPECTER. There are women in the room, Mr. Coleman. You can. [Laughter.]

Mr. COLEMAN. Well, can I just go off the record? I remember an instance when a judge you know in Philadelphia was arguing a case before a court on which Judge Allen sat. Judge Allen, I think, was the lady on the sixth or seventh circuit. In the midst of it, she beckoned him up, and he turned to his opponent, but she said, "No, I just want you up here." When he got up there, she said, "Look, will you please pull up your fly." So obviously that was an ex parte conversation which was permissible. [Laughter.]

Here, on the other hand, you have a different type of incident. My understanding of the practice is that even when you go down for a temporary restraining order, which the rules say the judge can grant ex parte, any judge worthy of his salt says, "Do you know who represents the other side?" And if you do know, you are supposed to say it, and he will then say, "Why do we not try to get Mr. Jones down." That is the way it is done.

Senator SPECTER. Mr. Coleman, I agree with you about that, but I am on a narrower point. It may have the appearance of impropriety and it may be a bad idea, but if Mr. Unger and Judge Gartner have a conversation in the courtroom outside the hearing of the other lawyer, and if they are genuinely talking about something which is not a subject matter of the case, I do not believe that that is ex parte communication.

Mr. COLEMAN. Then we have the affidavit——

Senator SPECTER. That is why I asked you the question. There is no proof in this record that they were talking about the case.

Mr. COLEMAN. If you are looking for proof, you have an affidavit by Mr. Foreman of Pennsylvania which is in the record, and that is exhibit D.

Senator SPECTER. All right. So you had two on the same day that you talked about. You talk about Mr. Foreman's affidavit.

Mr. COLEMAN. Two on the same day. You have Mr. Foreman's affidavit. You have Mr. Keeler's letter to the Senate Judiciary Committee, and I hope that you have his subsequent letter. I think you have a memorandum that he dictated at the time of the incident, and I hope that you have his subsequent letter. You recall that Mr. Unger tried to denigrate Mr. Keeler by saying that he had been cited for contempt and that he was a terrible lawyer. Mr. Keeler has now sent you a statement which tells you what happened, and if you read that statement, I hope you will conclude that the situation is a little different than the way Mr. Unger described it.

Senator SPECTER. So your contention is, on the record, you have two on the same day that you referred to. You have Mr. Foreman's affidavit. You have the Keeler incident, and you have the testimony of Mr. Berger and Mr. Hahalyak.

Mr. COLEMAN. Yes.

Senator SPECTER. So that is the total?

Mr. Coleman. That is the total that we have been able to produce in terms of having lawyers who are willing to come forward. When you read Mr. Unger's rebuttal, you will see why it is so hard to get lawyers to come forward. I think he even slightly accuses me of unethical conduct.

So it takes a lot of guts to be up here trying to oppose a nominee.

Senator Specter. So those are two, three, four, five matters where you submit there is evidence in the record of ex parte communications.

Mr. Coleman. Yes, of ex parte communications.

Senator Specter. You do not rely upon the investigation which the ABA conducted where lawyers told you things that they were not really ready to stand behind or appear on.

Mr. Coleman. If the lawyer would not come forward and authorize me by name and date to state what he said, I have not relied upon that, and the committee never relied upon that.

Senator Specter. You say that the committee never relied upon it, and while not directly relevant here, I would be interested. to repeat the question which we had a discussion on, albeit repetitious, that the committee does not rely upon such statements by lawyers or by witnesses who will not stand behind them in the committee's conclusions on the qualification of anyone to be a judge.

Mr. Coleman. That is correct. We feel that we have a responsibility, if we are going to make allegations, to rely only on those which are backed up.

Senator Specter. Well, I think that is very important. I, for one, am glad to hear that the ABA does not rely upon anyone who says anything that they will not stand behind and identify themselves.

Mr. Coleman. That is right. What we did was get allegations, which we then checked, and when we got facts, we relied upon the facts.

Ms. Born. Senator, we do not rely on confidential information to make a finding of not qualified. On the other hand we often rely on confidential information to make a finding of exceptionally well qualified, well qualified or qualified.

Senator Specter. Why do people want to be anonymous if it is complimentary?

Ms. Born. Well, they still feel, I think, more comfortable in talking to us.

Senator Specter. They do not want to be patronizing to judges and perhaps incur their good will. [Laughter.]

Ms. Born. We never, in that situation, have a setting in which we have to go back to our informants and ask for them to waive their confidentiality.

Senator Specter. It is OK if it is good. It is only bad if it is bad.

Mr. Coleman. Yes; I have finished what I would like to say about the ex parte conversations. And I hope that you as senators will not think it is just a lawyers' technicality. I think it is what makes our system a fair system and one where people are so willing to submit controversies to judges, whereas in other societies they would never accept the judges' decisions. I just think this has to be part of your consideration.

The next point I would like to address is the issue of the unreported income on Mr. Unger's 1968 Federal income tax return, which is on page 15 of my testimony. Once again, I would like to indicate just what is undisputed.

We called your attention to question 20 in the personal data questionnaire, which is sent by the Department of Justice. On page 15 we quote it. You also know that there is a question 19, which asks whether a person has been under investigation for possible violation of a Federal criminal statute.

Mr. Unger answered both of those questions no. In the course of my investigation, I did receive information on a confidential basis from a Federal judge who said he knew that Mr. Unger had had some tax problems.

Since Mr. Unger had said no to question 19 and 20, I would have dropped the investigation of this issue had I not received confidential information about a tax question.

I then asked Mr. Unger, in my office, and the chairperson was present at the time and she will, I hope, bear me out, whether he had had any tax problem. He said that on the year 1968 there had been a problem, that the only issue was whether he had received constructive income in a certain transaction where the Government was claiming there was an upstream merger. He said the matter was resolved and he said he paid little or no money in the resolution of it.

Later that day, he called me and said that the claim that the Government had was about $160,000 and that he had resolved it by a payment of $3,100. Now, all of us who are lawyers would tend to say that, if you can resolve that type of dispute for $3,100 when the Government was claiming $168,000, there was no tax problem.

But I did tell the Justice Department that they should investigate this because I felt that the Justice Department had access to records that we do not have access to, namely, the tax return.

I do not think anybody was more surprised than I was when Senator Metzenbaum started asking about a $40,000 unreported item in 1968.

That is the same year which I had asked Mr. Unger about. Suppose I had been in seeing you, Senator Hatch, being interviewed to be Secretary of Transportation, and you asked me whether I had any tax problem in 1968 and I said, "Oh, yes, I had a problem dealing with imputed upstream merger and income but I settled it for $3,100," and you thereafter found out before you voted on my confirmation that there was also a $40,000 item which, however you cut it, dealt with the same taxable year and in part the same taxable event. Would you think that I had leveled with you?

So what are the facts? It is clear that in June or July 1968 Mr. Unger got a check in the amount of $40,000. Early in his testimony he described it as a legal fee. Later on, he said it had something to do with a sale of rights, and the Government, at least in its report of April 15, 1971, which is exhibit E, page 1, of our supplemental testimony, described the $40,000 as a finder's fee.

But I do not care how you cut it, it is clear that in June or July in 1968 Mr. Unger got one check for $40,000 or two checks, each for $20,000. Now, you can do the arithmetic between June and April 15. It isn't long. It is 9 or 10 months.

When he filed his tax return, he did not report that $40,000. Now, he says he forgot about it. Well, I just ask you whether Federal judges are supposed to forget about $40,000.

I think he told you, Senator Specter, that he had had such a big income that for him $40,000 was not what it would be for most human beings.

Senator SPECTER. Mr. Coleman, he also said that he was wrong when he said that it was income, that it was proceeds from this complex property transaction.

Mr. COLEMAN. Yes; within 2 days he told you something different. But the fact is, I think, that the Judiciary Committee staff had asked him about this, so he had had a chance to review it sometime in September.

Senator SPECTER. But as I understand it when he said he had forgotten receiving the $40,000, he was harder on himself than the evidence indicated, that the real evidence was that he had not received $40,000 as a fee, that the funds were involved in the property exchange or upstream transaction.

Mr. COLEMAN. Oh, no. There was a check.

Senator METZENBAUM. Two $20,000 checks.

Mr. COLEMAN. Two $20,000 checks. He, thereafter, took $30,000 of that $40,000 and bought a one-third interest in the deal.

Senator SPECTER. But his initial testimony on the receipt of the $40,000 was that it was unrelated to a stock transaction.

Mr. COLEMAN. That is right.

Senator SPECTER. So that his first testimony was that there was no justification for his not reporting it as income.

Mr. COLEMAN. That is right.

Senator SPECTER. And his subsequent testimony was that it was part of a stock transaction, and I asked him, how could you testify earlier that the $40,000 appeared to be income and a few days later say that it was part of a stock transaction, and he said, in effect, that he had not reviewed his papers and had made a mistake. But his earlier testimony was a mistake to his detriment.

Senator METZENBAUM. Why do you say to his detriment, Senator?

Senator SPECTER. Because it would have been worse for him to have received $40,000 as a fee which he did not report, which is what he testified to first, than to get $40,000 as part of a stock transaction.

Senator METZENBAUM. It is a fact he got $40,000 as a fee for bringing this deal to the other two men. He then took $30,000 of the $40,000 and invested it to buy one-third in the stock transaction. It was not one and the same deal.

Senator SPECTER. Are you talking about the upstream merger?

Mr. COLEMAN. No.

Senator SPECTER. There is nothing to an upstream merger?

Mr. COLEMAN. That was the other part of the deal. There was somebody who died and whose estate wanted to sell the stock. He was able to find people who had the ability to purchase it. For that he got——

Senator SPECTER. A fee?

Mr. COLEMAN [continuing]. A fee which is either a legal fee or a finders' fee. One reason why maybe it was not described as a legal fee is if he were still a partner in Frost & Jacobs, perhaps he should have put it in the firm.

But anyway, he got that and then took $30,000 of it to buy his one-third interest.

Senator SPECTER. Well, one of the problems we have is trying to condense and understand very complex factual legal transactions which really only bear on ethics and character.

But if he received $40,000 which was, in effect, income, how did he get away with paying so little tax on it?

Senator METZENBAUM. He paid the full rate of tax plus a penalty.

Senator SPECTER. $18,000?

Senator METZENBAUM. He paid $26,000 finally but on the $40,000, I think the tax was only about $16,000 as I remember, and there was the $3,000——

Senator HATCH. $3,000 from the other.

Senator METZENBAUM. No; I think there was a delinquency penalty.

Mr. COLEMAN. Mr. Unger claimed part of it as expenses, and the Government accepted that. So he was able to deduct the expenses. But I do not care how you cut it. He got two checks of $20,000 each for something that anybody would say was a fee for services.

Now, his original explanation to you, Senator, was that he had a big income, that he was busy and he forgot it. But when you look at his 1968 tax return, you will find two things which ought to intrigue you. First, if you leave out this $40,000, I think his partnership income was only about $46,000. Some of us may be forgetful, but I think you do not forget a transaction in which you make almost as much money as you made from your partnership.

Second, you will find that in his original return, he did report two fees he got as director of this corporation. So in this 1968 return on which he forgot to report the $40,000, he at least remembered that he was somehow involved with this company because he did report the director's fees he received. When you look at the original 1968 return, you will see that.

Now, as to the first issue, do you really believe a person who got $40,000 forgot about it when he filed his tax return less than 10 months later, in a year in which it was almost half his income?

Another contention of Mr. Unger's is that he remembered it but that he filed his amended return "prior to the time he was audited." We have not been able to get this document, and I wish the committee would get it. But he testified that in March 1970, before he filed his amended return, he got a notice from the Internal Revenue Service saying that his taxes for 1968 were going to be audited. I do not know if any of you have ever had the privilege of getting such a notice, but as they say, "just before hanging, your mind gets awfully sharp." I assure you that when a taxpayer gets that notice, you really go back and you think, and that is the basis upon which he thereafter filed the amended return.

Senator HATCH. Mr. Coleman, in that regard, we did get a letter from the IRS today, from R. L. Rizzo, Director of Disclosure and Security Division, to the distinguished chairman of this full committee that this is all they have been able to find so far.

The analysis of the attached transcript reveals the following: (1) On December 18, 1969, a revenue agent requested Mr. Unger's 1968 return for audit. The date that Mr. Unger was initially contacted in connection with such audit cannot be determined. On May 20, 1970, Mr. Unger filed an amended 1968 return with which he sent a payment in the amount of $16,988.99. On December 25, 1970, additional tax of $20,748.01, a negligence penalty of $1,037.40 and interest of $1,477.57 were assessed. The resulting balance due which was reduced by the above May 20, 1970, payment was paid on December 31, 1970.

I think that is all we have been able to uncover. There is more in this letter. I have not had a chance to read it all.

We will put that letter in the record at this point.

[Letter follows:]

24 OCT 1983

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
U.S. Senate
Washington, DC 20510
Attention: Chip Reid, Minority Staff

Dear Mr. Chairman:

The following tax check information concerning Mr. Sherman E. Unger of 16 Corbin Drive, Cincinnati, Ohio (SSN 286-20-7911) is provided to you in accordance with waivers signed by him September 30 and October 11, 1983. This information updates our report of July 29, 1983, which was sent to Sheila C. Joy, Staff Assistant, Office of the Deputy Attorney General.

The only available information concerning Mr. Unger's 1968 income tax return is the enclosed IMF Retention Register which was maintained on microfilm. We sent a request to a Federal Records Center for Mr. Unger's 1968 return and found that it has been destroyed in accordance with established records retention requirements.

We also surveyed Examination and Criminal Investigation employees of the Cincinnati District and of the Cincinnati Appeals offices that were employed during the period in question. However, none of the employees recalled the case.

An analysis of the attached transcript reveals the following:

1. On December 18, 1969, a Revenue Agent requested Mr. Unger's 1968 return for audit. The date that Mr. Unger was initially contacted in connection with such audit cannot be determined.
2. On May 20, 1970, Mr. Unger filed an amended 1968 return with which he sent a payment in the amount of $16,988.99.
3. On December 25, 1970, additional tax of $20,748.01, a negligence penalty of $1,037.40 and interest of $1,477.57 were assessed. The resulting balance due which was reduced by the above May 20, 1970 payment, was paid on December 31, 1970.

Honorable Strom Thurmond

On October 19, 1982, we reported to the Department of Justice, Office of Attorney Personnel Management, that the taxpayer was referred to our Criminal Investigation Division on July 24, 1970 by the Examination Division. The Appellate Supporting Statement, a copy of which you provided us through the Department of Justice, indicates in the second paragraph of page 2 that the taxpayer filed an amended return while Intelligence Division was considering the case. Also, the second paragraph on page 5 of that statement says that the taxpayer filed an amended return after the examination of his return was started.

We requested the 1967, 1969, and 1970 income tax returns in addition to the 1968 mentioned above. However, we were informed that those returns were also destroyed per established record retention requirements. We are continuing our efforts to research any related files that could possibly contain information concerning Mr. Unger's 1968 tax affairs. If any such information does in fact materialize, we will provide it to you.

Sincerely,

R. L. Rizzo

R. L. Rizzo
Director
Disclosure and Security Division

Enclosure

cc: Sheila C. Joy
Department of Justice

PM:S:DS/RGittelman/md/10/21/83

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PAGE 5827      DISTRICT-CINCINNATI     31     IMF RETENTION REGISTER   CYCLE 7501          CARTRIDGE NO. 21
                                                      660  010672      525.00-  7204  31217-010-10995-2
                                                      836  041572    1,300.49   7216  31221-099-03538-2
204-20-7911 0 0 SHERMAN E & POLLY  UNGER    2 6812 E  150  082269   16,569.37   69325 31221-115-84368-97
                                                      610  041569      453.58-
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                                                      430  050468    2,022.40   6820  31220-125-50257-8
                                                      660  061468    1,011.20-  6829  31217-172-17222-8
                                                      660  091768    1,000.00-  6843  31217-269-10303-8
                                                      660  011769   11,588.80-  6905  31217-022-16540-9
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                     49352-10884                      420  121869         .00   7003  31229-333-06698-9
                                                      977  052070   16,988.99-  7024  52212-196-96900-0G
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                                                      300           20,748.01                             1
                                                      336           -1,477.57         31221-115-84368-9
                                                      670  123170    6,273.99-  7103  31217-006-70528-1
                                                      300  082771         .00   7133  31247-212-10003-1  206
                        411                           300  031372       ..00    7209  31247-043-70309-2  201      12-28-18
                                                      421                 .00
                                                      670  021772    3,679.41-  7210  31217-055-70147-2
                                                      570  032072         .00
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                                                      300  020772    3,023.42                             0
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.00 G: I

Senator METZENBAUM. I would like to point out to the chairman, Mr. Coleman, and Senator Specter that we have previously had before us an affidavit from Mr. Edgars which indicates that, and Mr. Unger makes much of the point that he talked to Mr. Eggers about the tax matter, but that did not occur actually until January 1970 when Mr. Eggers attended a reception for Justice Tom Clark, and he gave Mr. Unger a ride home.

But this letter indicates that 1 month before that, the revenue agent had requested Mr. Unger's 1968 return for audit and indicates that the IRS was actually into the matter 1 month before Mr. Eggers had ever been talked to by Mr. Unger.

Senator HATCH. Mr. Coleman, your testimony thus far is adding nothing to what your written statement said. We all have a copy of that. Would it be possible for us to do the questioning at this point or do you feel that you need to make some further statements?

Mr. COLEMAN. Well, I would just try to point out to you the documents that I hope you will work your way through.

Senator HATCH. We have.

Mr. COLEMAN. I know how busy you are, and therefore, I thought that I should point out the highlights. I have a lot of material in the statement.

Senator HATCH. We have read the statement.

Mr. COLEMAN. I was trying to set forth only those things that are uncontroverted, based on the evidence in the record. For example, I would beg you to read Mr. Unger's description of the Paul Eggers' affidavit and then read the affidavit itself. I really think that the affidavit does not say some of the things that Mr. Unger says about it.

With respect to the false affidavits, we now have the evidence that there were two incidents involving false affidavits. You have the one that we originally talked about. Then you have the incident described in Justice Moore's testimony. I hope that you have gotten Justice Moore's letter, which he sent the other day, with all the accompanying papers.

Senator HATCH. I think it would be well at this point to make that second letter of Justice Moore a part of the record.

[Second letter follows:]

SUPREME COURT OF DELAWARE

ANDREW G. T. MOORE, II
JUSTICE

THE ELBERT N. CARVEL
DELAWARE STATE BUILDING
WILMINGTON, DELAWARE 19801

October 24, 1983

Mr. Charles H. Reid, Jr.
United States Senate
Committee on the Judiciary
308 Hart Senate Office Building
Washington, D.C. 20510

Re: Nomination of Sherman E. Unger

Dear Mr. Reid:

Thank you for your courtesy in sending me both an excerpt of slightly more than three pages from certain comments made by Mr. Michael Kohn to the United States District Court for the District of Delaware on February 4, 1980, and Mr. Unger's letter of October 13, 1983 to Senator Thurmond. Moreover, I appreciate your telephone call to me on Friday, October 21, 1983, asking me to review these materials. I have done so.

With regard to Mr. Kohn's statement, it is the one to which I referred in my testimony before the Committee on October 5, 1983 (TR 152, 158, 159).[1] I have tried to review these documents from the standpoint that perhaps I could say Mr. Unger should be given the benefit of the doubt for having attempted to correct his false affidavit. I certainly wish that I could do so, but the record, which includes unchallenged findings of fact by a United States District Court, does not justify it. Because I have no desire whatever to be unfair to Mr. Unger, I will try to set out that record in some detail.

With regard to Mr. Kohn's statement:

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[1] References are to the transcript of the October 5, 1983 hearing before the Committee on the Judiciary of the United States Senate regarding the nomination of Sherman E. Unger as United States Circuit Judge for the United States Court of Appeals for the Federal Circuit.

First, it was very closely circumscribed. While he admitted that Mr. Unger's affidavit leaves the "impression" that he was never made aware of the potential conflict of interest prior to the date of the appointment of Mr. Tybout, that such "impression was incorrect", and that Mr. Unger had asked him to appear before the court and correct any "misinterpretation" contained in the affidavit, the entire thrust of Mr. Kohn's statement was limited as follows:

> " . . . Mr. Unger did state at the time that he dictated his affidavit that he still had no recollection of the letter written by Mr. Moore (on February 23, 1978) and that the connection became clear only when I called him and specifically referred to a letter of that date, and while he said that he could not be exactly sure that Mr. Tybout was contained in there, he certainly had no reason to doubt Mr. Moore's assertion and that he believed it to be true . . ." (Emphasis added.)

This is the statement to which I testified on October 5, 1983, (TR 152, 158, 159), although at that time I did not have a copy of Mr. Kohn's specific remarks available to me.

Second, this statement is not the "correction" that Mr. Kohn originally advised me on January 31, 1980 that he would make to the court. It is contrary to paragraph 11 of my affidavit dated February 1, 1980, a copy of which is in the record:

> "11. Yesterday, January 31, 1980, Mr. Kohn phoned me and indicated that he would be able to reach Mr. Unger who confirmed that he recalled my letter of February 23, 1978, including the specific reference to Mr. Elzufon's association with Mr. Tybout. Mr. Kohn related that Mr. Unger had asked him to relate that fact to the court, and thus correct any erroneous statement concerning Mr. Unger's knowledge of Mr. Elzufon's association with Mr. Tybout at the next proceeding before the court scheduled for Monday, February 4, 1980." (Emphasis added.)

You will note that the excerpt Mr. Kohn sent you takes no issue with paragraph 11 of my affidavit. To my knowledge neither Mr. Kohn nor Mr. Unger filed any counter affidavit or made any statements on the record in the Delaware federal court to dispute the nature of Mr. Kohn's communication to me on January 31, 1980. Indeed, if I correctly understood Mr. Unger's testimony before the Committee on October 5, 1983, he now relies on paragraph 11 of my February 1, 1980 affidavit. (TR 164, 165, 167, 169).

Third, Mr. Kohn's statement to the court on Mr. Unger's behalf was very carefully limited to my letter to Mr. Unger of February 23, 1978. Neither Mr. Unger nor Mr. Kohn filed any sworn statement in federal court contesting paragraph 6 of my February 1, 1980 affidavit, which makes clear that Mr. Unger's knowledge of the matter went beyond my letter of February 23, 1978. That portion of my affidavit states in pertinent part:

> "6. . . . However, I distinctly recall that after Peter Walsh made his application for the appointment of Alton Tybout, I discussed this with Mr. Unger and we were in joint agreement that Mr. Tybout's appointment should not be opposed. I also reminded Mr. Unger that Mr. Tybout was the same lawyer to whom I had referred in my letter to Mr. Unger of February 23, 1978 as well as the fact that Mr. Elzufon was associated with Mr. Tybout." (Emphasis added.)

Moreover, Judge Stapleton's conclusion of law No. 5 (pp. 10-11) was that in all of this, both Unit and Mr. Unger "knowingly consented" to Mr. Tybout's appointment. To my knowledge Mr. Unger has never previously challenged these findings of fact and conclusions of law. No motion for reargument was filed, nor was an appeal taken from Judge Stapleton's order denying the motion to disqualify Mr. Tybout.

Fifth, when I attempted to get Mr. Unger to fully correct the matter and withdraw his affidavit he did not answer my letter to him of January 30, 1980, which states in the third paragraph on page 1:

> " . . . In any event, I do recall that one of the points that you and I discussed in advance of Alton's appointment was that John Elzufon was then associated with Tybout & Redfearn."

A copy of this letter is in the record.

Sixth, it should be recalled that on September 19, 1979 Mr. Tybout's appointment as counsel to the trustee was reconfirmed by the Bankruptcy Court. We were instructed by Mr. Kohn not to take any position on this matter as shown by my memorandum dated September 17, 1979 to my partner, James S. Green and Mr. Green's letter of September 19, 1979 to the Honorable Helen S. Balick of the Bankruptcy Court. The Committee has copies of these documents. By this time Mr. Unger had further actual notice of Mr. Elzufon's association with Mr. Tybout as shown by the enclosed letter, dated May 2, 1979, from Mr. Tybout to several attorneys, including Mr. Unger. You will see that Mr. Elzufon's name is among the seven lawyers listed on Mr. Tybout's letterhead.

Mr. Unger's affidavit of January 19, 1980 indicates that the first time he realized Mr. Elzufon was employed by Mr. Tybout was on January 16, 1980 (see paragraphs 2 and 3 of Mr. Unger's affidavit and paragraph 2 of the affidavit of Mr. B. W. Morris, copies of which I previously furnished the Committee). However, by the time Mr. Unger signed his affidavit, he had received at least six more direct communications from Mr. Tybout, each of which disclosed on his letterhead that Mr. Elzufon was employed by the Tybout firm. Therefore, I enclose the following additional letters from Mr. Tybout, copies of which were sent to Mr. Unger by Mr. Tybout:

1) December 10, 1979 to the Honorable Walter K. Stapleton.
2) December 13, 1979 to Max S. Bell, Jr., Esquire.
3) December 13, 1979 to Paul P. Welsh, Esquire.
4) December 14, 1979 to the Honorable Walter K. Stapleton.
5) December 19, 1979 to Max S. Bell, Jr., Esquire.
6) January 2, 1980 to several lawyers, including Mr. Unger.

Significantly, these letters deal with forthcoming trials, which included claims Mr. Tybout was prosecuting against Mr. Unger's client, Unit, Inc.

Again, each of the foregoing letters from Mr. Tybout show Mr. Elzufon on the letterhead as being one of the seven lawyers comprising Mr. Tybout's firm. You will note that the last letter sent by Mr. Tybout to Mr. Unger was 17 days before Mr. Unger's affidavit of January 19, 1980. Nonetheless, Mr. Kohn told the court on February 4, 1980:

> " . . . Mr. Unger did state at the time that he dictated his affidavit that he still had no recollection of the letter written by Mr. Moore and that the connection (between Mr. Tybout and Mr. Elzufon) became clear only when I called him and specifically referred to a letter of that date . . . " (See page 3 of the excerpt of Mr. Kohn's remarks, lines 12 - 16) (Emphasis added.)

It is with regret that I have had to write this letter and I wish that I could reach a different conclusion from that which I stated to the Committee on October 5, 1983 (TR 160, 161), but in my opinion the record does not permit me to do otherwise. While I have tried to respond on the basis of the excerpt of Mr. Kohn's statement to the federal court on February 4, 1980, I trust you realize that what you have received from Mr. Unger is not the complete record of what was said to the court on that date. Other statements were made by Mr. Kohn, Mr. Tybout and me. In checking with the court reporter I find that the only request for the record to be transcribed was by Mr. Kohn, and it was limited to the brief excerpt you have sent me. However, in fairness to Mr. Kohn, I believe that this is the only segment where he attempted to "correct" Mr. Unger's affidavit.

Turning to Mr. Unger's letter of October 13, 1983, to Senator Thurmond, I believe that much of what I have already said places Mr. Unger's comments in their proper perspective. However, if I understand Mr. Unger's letter correctly, in the second paragraph of the first page it appears that he now contends that he did not previously know that Mr. Elzufon had worked on Freidco matters when he was employed by my former law firm. If that is Mr. Unger's position, it is incorrect. Attached is a photocopy of the signature page of a brief filed in the Freidco matter on or about August 2, 1976 bearing Mr. Elzufon's signature and Mr. Unger's name as co-counsel. This was the brief filed in opposition to the appointment of a trustee for Freidco. Mr. Elzufon was one of its draftsmen. Of course, Mr. Unger received a copy of this document, and he participated in the review of one or more drafts before the final version was filed with the court.

Mr. Unger's October 13, letter states that I should have advised the Committee that my February 23, 1978 letter to him "made no reference to Elzufon's involvement with Unit's affairs."

First, until Mr. Unger's October 13, 1983 letter was brought to my attention, I was unaware that he ever disputed Mr. Elzufon's involvement. The signature page from the above-described brief should make that clear. Second, Mr. Unger's memorandum of law, accompanying the motion to disqualify Mr. Tybout, argues that Mr. Tybout must be disqualified because of Mr. Elzufon's involvement in Unit's affairs. In Mr. Unter's January 21, 1980 "Brief of Unit, Inc.", a copy of which is on file with the Committee, he stated in the first paragraph of page 2:

> " . . . One of Moore's associates at that time was an attorney named John Elzufon (Elzufon). During that association, Elzufon participated in this case, representing the interests of Unit. Elzufon was a principal draftsman of (Unit's and Freidco's) Brief In Opposition to Defendants' Motion to Dismiss the Complaint. He was familiar with the facts alleged in the Complaint and possessed the confidences and secrets of Unit." (Emphasis and parantheses are Mr. Unger's.)

You will note that the signature page (page 10) of this memorandum is signed only by Mr. Unger.

Finally, I did indeed read the relevant portion of the February 23, 1978 letter to the Committee during my testimony on October 5, 1983, in response to a question from Senator Specter. See TR 154, lines 3 - 6. Moreover, as I told the Committee, Mr. Unger has always asserted the attorney-client privilege with respect to the contents of my February 23, 1978 letter to him. The following question by Senator Hatch makes this clear (TR 161, 162):

> "Senator Hatch. Okay. Do you have a letter in your file dated February 23rd, 1978?
>
> Justice Moore. Yes, I do. Now, Senator, if I might back up, I have never previously released that letter to anybody. And as a matter of fact, one of the points that Mr. Kohn made to me in regard to my motion to withdraw was that the attorney-client privilege was being asserted as to that letter. I felt that that was an unfair assertion of the attorney-client privilege, and I cited in my letter to Mr. Unger of January 30 the provisions of the Code of Professional Responsibility which I thought required me to disclose

> it. Nonetheless, I thought that the most important aspect of that letter was the reference to Mr. Unger's knowledge of the young associate.
>
> For that reason, I have never disclosed it, because it related to a matter in which Mr. Unger's honesty and integrity was challenged by Mr. Paul Welch.
>
> Senator Hatch. Is that letter part of the materials you have submitted?
>
> Justice Moore. No, sir, it is not, but I have the letter with me, and if Mr. Unger releases it, I certainly--he has once asserted the attorney-client privilege." (Emphasis added.)

It was not until Senator Hatch asked Mr. Unger if he would release the privilege that I immediately made the entire document available to the Committee (TR 162):

> "Senator Hatch. Mr. Unger?
>
> Mr. Unger. If there is any privilege, Mr. Chairman, I waive it and ask that it be made a part of the record.
>
> Senator Hatch. You waive the privilege.
>
> Could you provide that letter, then, Justice Moore, under those circumstances?
>
> Justice Moore. Yes, sir."

Also, I note from Mr. Unger's October 13, 1983 letter (page 3) that he takes issue with Senator Specter's questions regarding the continued prosecution of the motion to disqualify, when the factual underpinnings contained in Mr. Unger's affidavit were shown to be false. As I testified, that is what caused me to withdraw. If it is now Mr. Unger's contention that he had to pursue the spurious motion in order to mollify a client, as I understand he testified on October 6, 1983, then this would appear to be a violation of the Code of Professional Responsibility, Disciplinary Rules 2-110(B)(1), 7-102(A)(1), (3) and (5). These rules state in pertinent part:

> "DR 2-110(B) Mandatory withdrawal.
>
> A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:
>
> (1) He knows or it is obvious that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken for him, merely for the purpose of harassing or maliciously injuring any person."

* * *

DR 7-102(A) Representing a Client Within the Bounds of the Law.

(A) In his representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

* * *

(3) Conceal or knowingly fail to disclose that which is required by law to reveal.

* * *

(5) Knowingly make a false statement of law or fact."

It was on the basis of these ethical precepts that I withdrew from the Freidco litigation, and they constitute a further reason why I must regretfully conclude that Mr. Unger should not serve in the high office to which he has been nominated.

Finally, there is a two page memorandum of law as the last attachment to Mr. Unger's October 13, 1983 letter to Senator Thurmond. I can only assume that this is something Mr. Unger has recently prepared for the Committee. It does not appear to have been prepared contemporaneously with the motion to disqualify Mr. Tybout. What is significant is that when Mr. Unger lost the motion to disqualify Mr. Tybout, he never challenged that ruling either by a motion for reargument or on appeal. The findings of fact and conclusions of law of Judge Stapleton stand.

At your request, I am providing you with four extra copies of this letter and its attachments, so that you may deliver them to the members of the Committee who heard my testimony. Also, since I received a call on Friday, October 21, 1983 from Mr. Stephen J. Markman of Senator Hatch's staff regarding Mr. Kohn's statement to the federal court, I enclose a copy for Mr. Markman.

Again, my thanks to you and the Committee for your courtesy.

Respectfully yours,

A.G.T. Moore II

cc: Honorable Orrin G. Hatch
Honorable Arlen Specter
Honorable Howard Metzenbaum
Stephen J. Markman

AGTM/kg
Enclosures

LAW OFFICES
TYBOUT & REDFEARN
PROFESSIONAL ASSOCIATION
11TH FLOOR
300 DELAWARE AVENUE
P. O. BOX 2092
WILMINGTON, DELAWARE 19899

F. ALTON TYBOUT
B. WILSON REDFEARN
RICHARD W. PELL
STEPHEN P. CASARINO
JOHN A. ELZUFON
JEFFREY S. MARLIN
COLIN M. SHALK

658-6001
AREA CODE 302

May 2, 1979

Re: FREIDCO v. Farmers Bank v. Walsh
Civil Action No. 76-149

Peter J. Walsh, Esquire
Max S. Bell, Jr., Esquire
Thomas G. Hughes, Esquire
Sherman E. Unger, Esquire
Paul P. Welsh, Esquire
Andrew G. T. Moore, II, Esquire
Steven D. Goldberg, Esquire
Robert Goldberg, Esquire
Irving Morris, Esquire

Gentlemen:

On return to my office after the conference in Judge Stapleton's chamber on May 1, I discovered to my dismay that my schedule called for me to return from two weeks vacation on January 6, one day before the trial was scheduled to begin. I called Judge Stapleton's office and asked whether it would suit his schedule to move the beginning date of the trial to January 14 if it is suitable to the other attorneys. His office informs me that it is satisfactory to move the starting date to January 14 provided there are no objections by the other attorneys. I am by this letter notifying you of the Court's agreement to the new date. However, if the revised beginning date causes any hardships among the attorneys, I ask that you let me know as soon as possible. So far as I am concerned, the beginning date can be retained at January 7 if absolutely necessary. Unless I hear from any of you within three weeks, I will inform the Court that there is general agreement to beginning the trial on January 14.

Very truly yours,

Alton Tybout

F. ALTON TYBOUT

T/md

cc: William S. Anderson, Jr., Clerk

LAW OFFICES
TYBOUT, REDFEARN, CASARINO & PELL
11TH FLOOR
300 DELAWARE AVENUE
P. O. BOX 2092
WILMINGTON, DELAWARE 19899

F. ALTON TYBOUT
B. WILSON REDFEARN
RICHARD W. PELL
STEPHEN P. CASARINO
JOHN A. ELZUFON
JEFFREY S. MARLIN
COLIN M. SHALK

658-6901
AREA CODE 302

December 10, 1979

Re: FREIDCO v. Farmers Bank
Civil Action No. 76-149

The Honorable Walter K. Stapleton
Judge of the U. S. District Court
Federal Building - 844 King Street
Wilmington, Delaware 19801

HAND DELIVERED

Dear Judge Stapleton:

Your memorandum opinion of December 4 refers to issues to be tried to the jury on January 14, 1980. At the time of our conference on November 27, we discussed the matter of postponing the jury trial and I indicated that, on behalf of the Trustee, I wanted to take some further discovery but that I thought it was possible that we could be ready for trial on January 14. It was my impression and the Trustee's impression that the trial would be postponed to a time later in the spring. It does appear that we do want to take some further discovery including some depositions, interrogatories and requests for production. The Trustee and I do believe that the trial should be postponed for a number of months while this discovery is taken. I am by this letter on behalf of the Trustee requesting such a postponement.

Very truly yours,

Alton Tybout

F. ALTON TYBOUT

T/md

cc: William S. Anderson, Jr., Clerk
Peter J. Walsh, Esquire
Max S. Bell, Jr., Esquire
Thomas G. Hughes, Esquire
Sherman E. Unger, Esquire
Paul P. Welsh, Esquire
Andrew G. T. Moore, II, Esquire
Steven D. Goldberg, Esquire
Irving Morris, Esquire
Robert Goldberg, Esquire

LAW OFFICES
TYBOUT, REDFEARN, CASARINO & PELL
11TH FLOOR
300 DELAWARE AVENUE
P. O. BOX 7092
WILMINGTON, DELAWARE 19899

F. ALTON TYBOUT
B. WILSON REDFEARN
RICHARD W. PELL
STEPHEN P. CASARINO
JOHN A. ELZUFON
JEFFREY S. MARLIN
COLIN M. SHALK

[illegible]
AREA CODE 302

December 13, 1979

Re: Fredico v. Farmers

Max S. Bell, Jr., Esquire
Richards, Layton & Finger
P.O. Box 551
Wilmington, Delaware 19899

Dear Max:

Enclosed is a proposed statement of the agreed to facts as required by the local rule on pre-trial orders. The proposed agreed facts are drawn from the statement of facts contained in Freidco's post-hearing brief in the bankruptcy proceeding. I have edited the Freidco statement to delete the editorial comment in the statement of facts. In reviewing the factual background for these claims it seems to me that there is very little dispute about the facts and that a fairly elaborate statement of agreed facts, such as the one enclosed, can do a great deal to shorten the time of the trial. I am forwarding them at this time so that you can have an opportunity to look them over and review the documents cited and consider your position on them. I suggest that in doing so we delay for a court ruling whether any facts which you may consider irrelevant should actually be put before the jury. Meanwhile, we can at least agree to the proposed facts as being true, whether or not irrelevant.

By his copy of this letter I am sending Sherman Unger a similar copy with a proposal that he review the statement of facts and let me know his position. I would appreciate hearing from you on any parts of the proposed statement you feel should be altered, deleted or expanded.

Very truly yours,

Alton

F. ALTON TYBOUT

T/md
Enclosure
cc: Peter J. Walsh, Esquire (Enc.)

LAW OFFICES
TYBOUT, REDFEARN, CASARINO & PELL
11TH FLOOR
300 DELAWARE AVENUE
P. O. BOX 2092
WILMINGTON, DELAWARE 19899

F. ALTON TYBOUT
B. WILSON REDFEARN
RICHARD W. PELL
STEPHEN P. CASARINO
JOHN A. ELZUFON
JEFFREY S. MARLIN
COLIN M. SHALK

658-6901
AREA CODE 302

December 13, 1979

Re: Freidco v. Farmers Bank

Paul P. Welsh, Esquire
Morris, Nichols, Arsht & Tunnell
P.O. Box 1347
Wilmington, Delaware 19899

Dear Paul:

This will confirm our conversation about the availability of your clients, Mr. Hickman and Mr. Tingle. I have prepared a notice of deposition at the times we agreed upon. I am assuming that it will not be necessary to request that subpoenas issue for their attendance at the depositions as scheduled.

Very truly yours,

F. ALTON TYBOUT

T/md

cc: Peter J. Walsh, Esquire
Sherman E. Unger, Esquire
Max S. Bell, Jr., Esquire

LAW OFFICES
TYBOUT, REDFEARN, CASARINO & PELL
11TH FLOOR
300 DELAWARE AVENUE
P. O. BOX 2092
WILMINGTON, DELAWARE 19899

F. ALTON TYBOUT
B. WILSON REDFEARN
RICHARD W. PELL
STEPHEN P. CASARINO
JOHN A. ELZUFON
JEFFREY S. MARLIN
COLIN M. SHALK

658-6901
AREA CODE 302

December 14, 1979

Re: Freidco, et al. v. Farmers
Civil Action No. 76-149
CONSOLIDATED ACTIONS

The Honorable Walter K. Stapleton
Judge of the U. S. District Court
Federal Building - 844 King Street
Wilmington, Delaware 19801

Dear Judge Stapleton:

Pursuant to your letter of December 11, I am writing at this time to inform the Court of the status of the Trustee's need for further discovery. I have arranged for the taking of the depositions of Robert E. Hickman, Harry Tingle and Edward Connor on Thursday, December 20 and on Friday, December 21. The Trustee has also served a request for production on Farmers Bank. A copy is attached to this letter. We will, if the trial date stands, need the Court's assistance in fixing an accelerated date for the filing of a response. Although I want to take the deposition of H. Whitwell Wales, he is presently in California and I have been unable to arrange for the taking of his deposition.

I have attempted to arrange for Mr. Morris' further deposition on the same dates but I have been unable to reach Mr. Unger and Mr. Kohn, his associate, tells me that he does not feel he can commit Mr. Morris to an appearance in Wilmington.

The areas of inquiry which Mr. Walsh and I would like to pursue include those which have to some extent already been covered in the depositions taken before the appointment of the Trustee and the testimony in the Bankruptcy Court hearing. However, in Mr. Walsh's opinion and in my opinion the inquiry into the issues was not sufficient to develop the facts adequately for preparation for trial. The issue at the time of those depositions and at the time of the hearing was simply the matter of whether a Trustee should be appointed. The issues with which the trial will be concerned were touched upon in the depositions and on the hearing but not as completely as it seems to me is necessary for preparation for trial. In addition, the subject matter of the additional cause of action proposed in the motion for leave to amend the complaint has not been adequately covered. This includes all aspects of the handling of the conflict of interest situation which existed between the bank's interests in its several different capacities as real property manager, tenant and potential purchaser and as banker for Freidco and creditor of Unit.

In my opinion the discovery which should be taken is substantially broader than that which is being undertaken at this point. The trustee continues to believe that proper preparation for the trial requires an additional several months. However, if the Court determines that it is necessary to hold to the present trial schedule, we will do our best to prepare for it with the discovery presently scheduled. We would, however, hope to be able to ask the Court to permit further discovery after the depositions which are presently scheduled.

Very truly yours,

Alton Tybout

F. ALTON TYBOUT

T/md

Enclosures

cc: William S. Anderson, Jr., Clerk
Max S. Bell, Jr., Esquire
Thomas G. Hughes, Esquire
Sherman E. Unger, Esquire
Andrew G. T. Moore, II, Esquire
Peter J. Walsh, Esquire

LAW OFFICES
TYBOUT, REDFEARN, CASARINO & PELL
11TH FLOOR
300 DELAWARE AVENUE
P. O. BOX 2092
WILMINGTON, DELAWARE 19899

F. ALTON TYBOUT
B. WILSON REDFEARN
RICHARD W. PELL
STEPHEN P. CASARINO
JOHN A. ELZUFON
JEFFREY S. MARLIN
COLIN M. SHALK

658-6901
AREA CODE 302

December 19, 1979

Re: Freidco, et al. v. Farmers

Max S. Bell, Jr., Esquire
Richards, Layton & Finger
P.O. Box 551 - Farmers Bank Building
Wilmington, Delaware 19899

HAND DELIVERED

Dear Max:

Enclosed is the proposed pre-trial order for submission to the court. When you have reviewed it and executed it, will you send the original to Judge Stapleton. I have not designated those exhibits which are objected to since none of us have had the opportunity to decide what is objected to and what is not. My proposal is that we simply tell the court that we have not been able to get to this item and that we will file a note on our position concerning the exhibits at some specified point in the future. I have not had an opprotunity to see all of the exhibits and therefore may ask leave of the court to add some more.

Peter Walsh has not had an opportunity to examine this document and he may have some changes. I am forwarding it without his careful examination in the interest of expediency.

Very truly yours,

F. ALTON TYBOUT

T/md
Enclosure
cc: Peter J. Walsh,Esquire
Sherman E. Unger, Esquire
Thomas G. Hughes, Esquire
Andrew G. T. Moore, II, Esquire

Law Offices
Tybout, Redfearn, Casarino & Pell
11th Floor
300 Delaware Avenue
P. O. Box 2092
Wilmington, Delaware 19899

F. Alton Tybout
B. Wilson Redfearn
Richard W. Pell
Stephen P. Casarino
John A. Elzufon
Jeffrey S. Marlin
Colin M. Shalk

658-4901
Area Code 302

January 2, 1980

Re: Freidco v. Farmers

Andrew G. T. Moore, II, Esquire
Thomas G. Hughes, Esquire
Sherman E. Unger, Esquire
Max S. Bell, Jr., Esquire
Paul P. Welsh, Esquire

Gentlemen:

Enclosed is a notice of deposition of a number of persons who we believe should be further deposed. We plan to consider at a later point whether we need further depositions to complete discovery. All depositions are noticed for 9:30 A.M. on January 15. I assume that we will at some point between now and then work out some satisfactory schedule. I am assuming that Paul Welsh will make Mr. Hickman and Mr. Tingle available without the necessity of a subpoena. I propose to begin the depositions on Tuesday by continuing Mr. Hickman's deposition. I assume that there will be adequate time during the day to take Mr. Tingle's deposition. Meanwhile, we are awaiting word from Mike Kohn about the availability of Mr. Morris.

By his copy of this letter, I am asking Paul Welsh to have Mr. Hickman search his files for whatever further files and materials he may have available to him. In the course of his deposition recently, he referred to the fact that he might have some files still in his possession in his office. I also ask that Paul have Mr. Tingle bring whatever files he may have on the Freidco of Wilmington venture.

Of course anyone who wants to notice other depositions should feel free to do so for my office or elsewhere.

Very truly yours,

Alton
F. ALTON TYBOUT

T/md

cc: Peter J. Walsh, Esquire

Enclosures w/ea.

CONCLUSION

For the foregoing reasons, the application for appointment of a trustee should be denied.

Respectfully submitted,

KILLORAN & VAN BRUNT

Andrew G. T. Moore, II

Daniel M. Kristol

John A. Elzufon
801 Market Tower
P. O. Box 148
Wilmington, Delaware 19899
Attorneys for Debtor

Of Counsel:

Sherman Unger, Esquire
2918 Observatory Road
Cincinnati, Ohio 45208

Dated: August 2, 1976

SUPREME COURT OF DELAWARE

ANDREW G. T. MOORE, II
JUSTICE

THE ELBERT N. CARVEL
DELAWARE STATE BUILDING
WILMINGTON, DELAWARE 19801

October 25, 1983

Mr. Charles H. Reid, Jr.
United States Senate
Committee on the Judiciary
308 Hart Senate Office Building
Washington, D.C. 20510

Re: Nomination of Sherman E. Unger

Dear Mr. Reid:

Implicit in my letter to you of October 24, 1983, but not directly referred to, is Judge Stapleton's finding of fact No. 6 which makes it clear that Mr. Unger's knowledge of Mr. Tybout's alleged conflict of interest was not confined to my February 23, 1978 letter to Mr. Unger. (See page 3 of Judge Stapleton's Findings of Fact and Conclusions of Law, February 8, 1980, a copy of which has been furnished the Committee). Specifically, Judge Stapleton found:

> " . . . After receiving notice of the proposed engagement (of Tybout) Moore discussed with Unger what position Unit should take with respect to the trustee's application. During this discussion, Moore specifically reminded Unger that Tybout was the same lawyer referred to in his earlier letter and that Elzufon was associated with Tybout."
> (Emphasis added.)

Thus, the excerpt of Mr. Kohn's statement to the court on February 4, 1980, which by its terms was carefully limited to Mr. Unger's recollection of my February 23, 1978 letter (see pages 2-4, 6 of my October 24, 1983 letter to you), is not consistent with Judge Stapleton's finding No. 6. Significantly, Mr. Unger did not contest this finding of fact in court. He permitted it to stand unchallenged.

While my testimony on October 5, 1983 refers to this finding (TR 155, 156),[1] I wanted the Committee to know that the foregoing matters are among the specific reasons, based on the entire record, which lead me to reluctantly conclude that Mr. Unger's "correction" was not candid.

Respectfully yours,

A.G.T. Moore II

cc: Honorable Orrin G. Hatch
Honorable Arlen Specter
Honorable Howard Metzenbaum
Stephen J. Markman

AGTM/kg

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[1] References are to the transcript of the October 5, 1983 hearing before the Committee on the Judiciary of the United States Senate, regarding the nomination of Sherman E. Unger as United States Circuit Judge for the United States Court of Appeals for the Federal Circuit.

Mr. COLEMAN. Then to go on, with respect to Mr. Unger's termination from the Department of Housing and Urban Development, as previously testified, I was told that he had been fired. He denied it to me. He certainly denied it to you.

But I just want to call your attention to the testimony of one of Mr. Unger's witnesses on October 5, 1983, which I cite on page 31. The witness says that Mr. Unger was fired from his position at HUD, and that was a witness that Mr. Unger produced himself.

I would leave it up to you, particularly in light of the letter that Mr. Unger wrote to Mr. Ruediger, to determine whether one could really say in good conscience that the whole idea of the conflict of interest had not been developed by Mr. Unger, and I ask you to compare that with his original testimony.

Senator HATCH. We have that point.

Mr. COLEMAN. Then just to skip through, I indicated to you on the record that I recalled that there were at least 11 instances where Mr. Unger had said to the A.B.A. committee things which eventually proved to be untrue. I would just ask you to look on pages 33, 34, 35, 36, and 37 of our written testimony, and you will see that there are 16 such instances. I would like you to ask any questions you might have about any of those instances.

Senator HATCH. All right. We certainly read this.

Mr. COLEMAN. In conclusion, we do not look on ourselves as advocates. But people are affected by their own lives, and there were times in my life when, because of the history of the country, the only place we really could look to protect our rights was to the Federal judiciary.

We knew that we often dealt with people who were hostile, but we had great confidence that the Federal judges were ethical and did not engage in the type of conduct which we think our investigation revealed that Mr. Unger engaged in as a lawyer.

Life has been good to me and now instead of defending the downtrodden, I often have the privilege of defending the major corporations, and the fact is that the major corporations are also willing to submit their destiny to the Federal bench and abide by its decisions.

I think it would be quite disturbing if there were a man on a court as important as this Federal court about whom there was so much doubt. If he conducts himself on the bench as he did in his prebench life, there would be great concern about whether major companies could feel confident submitting issues to such a court, particularly if they felt he did not have a better sense of when you should engage in conversations other than on the record.

Senator HATCH. Thank you, Mr. Coleman.

Senator Specter, do you have any additional questions?

Senator SPECTER. There are some issues beyond those raised by major corporations, are there not?

Mr. COLEMAN. What is that?

Senator SPECTER. There are some significant parties other than the major corporations.

Mr. COLEMAN. Sure. I am just saying that in all my lifetime I have really looked to the Federal courts for justice. We are advocates, and we enjoy what we do. But in the final analysis on so many issues, whether they be major companies or minor cases—

after all, the *Ship's Money* case only involved 6 cents but it was a major case—you really depend upon that man or woman up there in that robe.

And when you leave that courtroom and know that you I have done your best, that you have written the best brief, and tried the case the best way, you are confident that your opponent is not going to be able to go in to see that judge. You all have friends who are judges and you socialize with them from time to time, but you do not talk about pending legal matters with them.

I just think that is the way it has to be.

Senator SPECTER. Mr. Coleman, I think we all value highly the integrity of the Federal bench, and you have made an excellent argument, but I just wondered why you focused on the interest of the corporations.

Mr. COLEMAN. No; I was just trying to scale my own life.

Senator HATCH. I know you meant more than that, and you know he meant more than that. [Laughter.]

Senator SPECTER. Quit trying to stick up for Mr. Coleman, Senator Hatch.

Senator HATCH. I know Bill Coleman very well and I want to compliment you for the effort that you and Ms. Born have put forth. This has not been easy for anybody, and I know you are sincere. I know you are dedicated, and I think you have been very helpful to the committee to be honest with you.

Do you have any other questions, Senator Specter?

Senator SPECTER. No; I just thank you for your participation, Mr. Coleman. I have known you for a long time and you are an extraordinary lawyer and you are a tribute to public service and to the bar, and I thank you.

Senator HATCH. Senator Metzenbaum, any questions?

Senator METZENBAUM. I have no further questions. I do thank Mr. Coleman and Ms. Born for all of the time and effort you have put in. It is a rather selfless task and probably you have taken a fair amount of abuse, and I think that there is very little upside in doing what you are doing and a lot of downside. So I thank you as one member of the bar.

Senator HATCH. And I think we all feel that way. I think that these are difficult matters. We all believe in the integrity of the Federal bench, and these positions are very, very important. They are lifetime positions, and we appreciate the effort you have put forth.

Mr. COLEMAN. I would just move that my full testimony be put in the record together with all the accompanying exhibits.

Senator HATCH. Thank you so much.

At this point, we will call on Mr. Unger as the last witness in this confirmation proceeding. We will take a short break at this time.

[Whereupon, a short recess was taken.]

Senator HATCH. Mr. Unger, you have waited a long time to be able to have your say. We have called you out of the audience. We have asked you to rebut or at least give your feelings concerning certain questions as they have arisen. But this is probably the first time that you have had, in this proceeding, to really tell your side of this and to resolve any of the conflicts that you think exist.

You have heard Mr. Coleman for a good 5 hours on this matter. Part of that was our fault because of the questioning and so forth. You have also heard others who have testified. Let us turn the time over to you and we will make sure you have ample time to be able to explain your side.

TESTIMONY OF SHERMAN E. UNGER OF OHIO TO BE U.S. CIRCUIT JUDGE FOR THE FEDERAL CIRCUIT

Mr. UNGER. Senator, I sincerely appreciate the first opportunity I have had to really give a comprehensive statement in this hearing. I have been questioned and tried to answer the best that I could.

Senator SPECTER. Mr. Chairman, I notice the absence of Mr. Coleman. We are just resuming after a very short break. If we want to be here, perhaps we should wait for him.

Senator HATCH. Well, I think you can go ahead. If you can notify Mr. Coleman, we would be glad to have him in here.

Go ahead.

Mr. UNGER. If we are going ahead, I would tell you my plan is to respond to Mr. Berger and Mr. Hahalyak before I go into my surrebuttal.

Senator HATCH. I think that is fair since they both testified earlier today. Go ahead.

Mr. UNGER. If I may quickly, Mr. Berger and Mr. Hahalyak got into the substance of a number of pieces of litigation, most of which I was not involved. I became General Counsel of the Department of Commerce in May of 1981. As you could hear, this is still continuous, ongoing litigation, presumably in Pittsburgh and Lexington, Ky., and again, I believe in Cincinnati. I have no involvement in that. I resigned from my former firm in May of 1981.

Mr. Hahalyak and Mr. Berger both make the statement that I represented Mr. Morris in 1971. I did not know Mr. Morris in 1971. We had, last night, prepared a response to their affidavit, and I would ask that they be distributed to the Senators who are here.

Senator HATCH. Without objection, we will distribute them and we will also enter them into the record at this point.

[Statement follows:]

SUPPLEMENTAL STATEMENT
BY WAY OF REBUTTAL
BY MORRIS M. BERGER AND MICHAEL HAHALYAK

To the Honorable, the Chairman and Members of the Senate Judiciary Committee inquiring into the matter of the confirmation of the appointment of Sherman E. Unger, Esquire, as a Judge of the United States Court of Appeals.

We respectfully submit the following supplemental statement by way of Rebuttal of testimony given by the candidate:

1. We respectfully state that we were requested to submit such rebuttal due to the fact that we could not do so on account of the adjournment of the hearing on October 27, 1983.

2. We would like to correct certain statements made by Mr. Unger. Mr. Unger stated that the hearing on June 19, 1980, involved only the creditors and for that reason he did not given notice to the Limited Partners.

This statement is erroneous for several reasons:

(a) The property that Unit Inc. was attempting to sell was not the asset of Unit Inc., but the property of the Limited Partners of B & B Properties;

(b) Each of the Limited Partners was a creditor of Unit Inc. because Unit Inc. had guaranteed under the Partnership Agreement payment to the Limited partners aggregating $150,000.00, which had not been paid. The status of the partners as creditors is shown in the audit report filed by Unit's accountant. Although the Limited Partners were listed in the audit report as creditors of Unit Inc., Sherman Unger failed to include them in the statement of creditors in his bankruptcy statement.

Had Mr. Unger included the Limited Partners as creditors in his Petition for Arrangement in 1975, the Limited Partners would have had notice of the bankruptcy and because of the conflict of interest would have required his discharge. By not receiving this notice to which they were entitled as far back as 1975, the Limited Partners were not aware of the bankruptcy under Chapter 11 until approximately 4½ years later. This was the first notice of the bankruptcy proceeding received by the Limited Partners.

3. Mr. Unger states that the Partnership Agreement allows the assets of B & B to be sold as long as 50% of the Limited Partners consent, which consent cannot be arbitrarily withheld. This is entirely false. There is nothing to support this position other than his argument. Under the Partnership Agreement, the 50% consent applies only to continuing management affairs, i.e., sales in excess of $100,000 and not to the entire sale and termination of the business. This clause also applies only to sales within partnership purposes.

4. The candidate, Sherman Unger, Esquire, during the hearing of October 27, 1983, stated that his Application

to the Bankruptcy Court on behalf of the General Partner resulting in the Order of Court dated June 19, 1980, permitting the sale of B & B Properties' holdings for the purpose of raising funds to pay off the bankrupt General Partner's debts, was proper. As a bankruptcy lawyer with many years of expertise in that field, Mr. Unger knew or should have known that a Bankruptcy Court has no jurisdiction to order the sale of the entire assets of a viable, successful partnership enterprise, merely because an owner of a fractional interest in said partnership is in bankruptcy and that only the bankrupt's assets, which includes its fractional interest, is within the jurisdiction of the Bankruptcy Court.

5. Mr. Unger, as a lawyer of expertise in bankruptcy matters, should have known that the Order allowing Limited Partners to register their refusal to consent within five days of the receipt of a copy of the Order of June 19, 1983, giving adequate reasons for refusal, was not equivalent to the requirement of the Land Contract requiring approval without the necessity of giving "reasons that had to be reasonable." He should also have known that the Order mandating that failure to register refusal or refusal without adequate reasons would be deemed to give consent and would be equivalent to the taking of their property without due process of law, and confiscatory.

6. We refute Mr. Unger's statements that he had conformed with the law in obtaining the Order of Court to sell B & B Properties, the sole asset of the partnership,

as a whole to satisfy the debts of his client, Unit Inc., for the following reasons:

a. The Bankruptcy Court had no jurisdiction whatsoever over the property of the Limited Partnership, B & B Properties, which was not in bankruptcy, and merely because the General Partner was in bankruptcy and since it had to sell its 12½% interest in the partnership which it owned as a Limited Partner did not confer jurisdiction in the Bankruptcy Court.

b. The candidate should have followed the procedure of §362.490(2) of the Uniform Limited Partnership Act of the Commonwealth of Kentucky which states:

> "362.490 Rights, powers and liabilities of the General Partner. A General Partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without Limited Partners, except that WITHOUT THE WRITTEN CONSENT OR RATIFICATION OF THE SPECIFIC ACT BY ALL THE LIMITED PARTNERS, A GENERAL PARTNER OR ALL OF THE GENERAL PARTNERS HAVE NO AUTHORITY TO DO ANY ACT WHICH WOULD MAKE IT IMPOSSIBLE TO CARRY ON THE ORDINARY BUSINESS OF THE PARTNERSHIP."

c. The candidate should have advised his client, Unit Inc., that it must obtain the written consent of all the Limited Partners of B & B Properties to this specific act, namely, the sale of Patchen Place, and that, having obtained such consent, he would present an Application to the Bankruptcy Court to approve the sale of Unit's 12½% interest in the partnership over which the Bankruptcy Court did have jurisdiction as an asset of the bankrupt.

d. We respectfully submit, that by proceeding in the manner in which he did, the candidate attempted to circumvent the law and its procedure and has involved the Limited Partners of B & B Properties in an endless and ongoing scenario of suits and counter-suits, to their detriment and financial losses, all of which were avoidable if the candidate had acted according to law.

Mr. UNGER. I will go ahead. They will catch up with you if that is permissible.

Senator HATCH. Go ahead.

Mr. UNGER. A large number of their factual allegations are in error, particularly when they say that I obtained two ex parte orders from the court. As I am sure this committee is now well aware, in 1971 I was not representing Mr. Morris, but I was a vice president of American Financial Corp. and we have heard ad infinitum of my departure.

I did not meet Mr. Morris until late 1972 or early 1973 and represented him personally in only one minor matter sometime in 1978 or 1979. Again, Messrs. Berger and Hahalyak stated under oath in their affidavit that I had been negotiating on behalf of Unit, Inc., for the sale of Patchen Place Apartments.

This was owned by B&B Properties. I did not negotiate that sale. These negotiations were conducted solely by Mr. Morris and a representative or either Patchen Place Investment Group or a broker representing that group.

I was able to contact Mr. Morris late last night. I have an affidavit from Mr. Morris to that effect that I would like to present for the record.

Senator HATCH. Without objection, we will place it in the record at this point.

[Affidavit follows:]

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF ALLEGHENY)

BEFORE ME, the undersigned authority, personally appeared MORRIS M. BERGER, ESQUIRE, and MICHAEL HAHALYAK, ESQUIRE, who, being duly sworn according to law, depose and say that the statements set forth in the attached Supplemental Statement By Way of Rebuttal are true and correct according to their information, knowledge and belief.

Morris M. Berger
MORRIS M. BERGER

MICHAEL HAHALYAK

SWORN to and subscribed
before me this 28th day
of October, 1983.

Janet L. Christensen
NOTARY PUBLIC

JANET L. CHRISTENSEN, NOTARY PUBLIC
PITTSBURGH, ALLEGHENY COUNTY
MY COMMISSION EXPIRES MAY 23, 1985
Member, Pennsylvania Association of Notaries

STATE OF OHIO)
)SS.
COUNTY OF HAMILTON)

AFFIDAVIT OF B.W. MORRIS

I, B.W. Morris, being first duly sworn state as follows:

1. I am a citizen of the State of Ohio and the chairman of Unit, Inc., a Texas corporation.

2. I did not meet Sherman E. Unger until late 1972 or early 1973.

3. Sherman E. Unger has represented me personally only in one minor matter during 1978 and 1979.

4. Prior to June of 1980 Unit, Inc., in its capacity as general partner of B & B Properties, a Kentucky limited partnership, negotiated for the sale of the Patchen Place Apartments owned by B & B Properties to the Patchen Investment Group.

5. I conducted those negotiations with the Patchen Investment Group as chairman of Unit, Inc. the general partner of B & B Properties. The negotiations were consummated in the execution of a land contract dated May 12, 1980.

6. Sherman E. Unger did not conduct or participate in those negotiations and did not consummate those negotiations.

FURTHER AFFIANT SAYETH NAUGHT.

BWMor

B.W. Morris

SWORN TO and SUBSCRIBED before me a Notary Public this 27th day of October, 1983.

Patrick A. Kahl

Notary Public

PATRICK A. KAHL, Attorney at Law
NOTARY PUBLIC - STATE OF OHIO
My Commission has no expiration
date. Section 147.03 O.R.C.

Mr. **Unger**. It came over a telecopier. I can get a signed original but I did not have time to accomplish that before this meeting.

Senator **Hatch**. We would appreciate it if you would submit the signed original. We will take that for the purpose of identification here today.

Senator **Unger**. Again, Messrs. Hahalyak and Berger state under oath that I consummated the land contract between Unit, Inc. and Patchen Place. I did not consummate it. I did not negotiate it nor did I draft it.

I did notarize Mr. Morris' signature only, and then Messrs. Hahalyak and Berger, in their sworn affidavit——

Mr. **Specter**. Are all attorneys notaries in Ohio?

Mr. **Unger**. Yes, sir, they are notaries for life in Ohio.

Then Messrs. Berger and Hahalyak refer to an ex parte order that I obtained on June 19, 1980, and I do not know if the booklets that we prepared have been handed out yet or not, but I would refer you to tab No. 2, if you have them. Tab No. 2 is an application for authorization of the sale of the assets of B&B Properties with a copy of the contract attached thereto.

It was filed on June 9, 1980, in the Bankruptcy Court in Cincinnati, Ohio. Accompanying that was a notice of hearing on application for authority to exchange partnership interest, an application for authorities for the sale of the assets of B&B Properties.

That notice was sent to every credit of Unit, Inc.

Senator **Metzenbaum**. When was that sent, Mr. Unger?

Mr. **Unger**. It was sent by the court, and I cannot tell you what day, sir.

Senator **Metzenbaum**. As I read your own statement, you indicate that on June 9 you filed the application for approval to sell the assets of B&B. On June 19, 10 days later, the clerk of the bankruptcy court prepared and distributed a notice of hearing with respect to Unit's application. On June 19, that very same day that the notices went out, the hearing was held in accordance with the court's notice.

On June 19 following the hearing, the court entered its order authorizing the sale of the assets of B&B Properties. That same day, Unit, Inc., wrote the limited partners and enclosed a copy of the court's order.

Now, unless I am not understanding your own document, you filed the application on June 9. The notices were not being sent out until June 19 by the bankruptcy court. On June 19 the order was obtained, obviously ex parte. You indicate one creditor appeared. I do not know how they got notice of it.

And if that is not an ex parte determination, I do not know what is.

Mr. **Unger**. Well, Senator, you are very perceptive. You picked up a typographical error. If you will allow me to direct your attention to the notice itself.

Senator **Metzenbaum**. I do not know where that is. You have given me a whole book. I cannot read it all in 5 minutes.

Mr. **Unger**. Tab 3, sir. The typographical error you picked up should have said that the notice dated June 9 went out at the same time, and you will see June 9 at the bottom where the deputy clerk sent out the notice.

Senator METZENBAUM. No, I do not see that. In fact, as I do see it, it is stamped on it "Received June 16" I think.

Senator HATCH. That is June 10.

Mr. UNGER. June 10, received in my office, mailed June 9 by the district court. That is my office stamp.

There was a hearing on June 19. A creditor was present. It was in open court.

Senator METZENBAUM. Give me some confirmation. It says it went to creditors of the debtor and parties in interest.

Mr. UNGER. Yes, sir.

Senator METZENBAUM. Would that have included B&B?

Mr. UNGER. Not at that time. If the Senator will let me continue, I will explain that.

Senator METZENBAUM. Sure.

Mr. UNGER. There was an open hearing on whether it was appropriate for Unit, Inc. to sell its interest if it was in the best interest of the debtor in possession and its creditors for Unit to sell its interest in B&B pursuant to the contract that was attached to the application.

At that hearing, it was brought out that the limited partners of B&B had a right of approval of any sale, and I believe the contract also provided that such approval could not be unreasonably withheld, and that was pointed out to the court.

Therefore, at the end of that hearing, the court instructed the debtor in possession to notify all of the limited partners that it was the court's disposition to go forward with the sale, that he thought it was in the best interest of Unit, Inc. but that if any limited partner had any interest in not approving it and had grounds for disapproving it, it should notify the court. And I believe there was a 10- or 11-day notice in that letter.

The letter, I believe, sir, is tab 6 attached to this handout, dated June 19, the same day the court entered its order, explaining that to the limited partners.

Senator METZENBAUM. Mr. Unger, let me understand something.

Mr. UNGER. So far we have had nothing that is ex parte.

Senator METZENBAUM. So far it looks to me as if it is all ex parte, but——

Mr. UNGER. I beg your pardon, sir. How could it be all ex parte. It was in open court with notice.

Senator METZENBAUM. Well, you are saying with notice and yet I do not see any confirmation of the notice.

Mr. UNGER. The notice itself is confirmation, would you not think so?

Senator METZENBAUM. No. These men say they never received the notice, and there is no confirmation of that notice ever having been sent and confirmed receipt of it. All you have in your book here is a receipt that you say has your stamp on it. It does not indicate whose stamp is on it.

Mr. UNGER. They were not creditors of Unit, Inc. at the time the original application was made.

Senator METZENBAUM. Exactly the point.

Mr. UNGER. They were not people to be given notice of the first consideration. They were people to be given notice of whether they should approve, and they were given notice, and I have called your attention to tab 5, and that is that notice.

Senator METZENBAUM. These two men have indicated, and I gather that you indicate that B&B owned the property, is that right?

Mr. UNGER. B&B was a partnership in which Unit, Inc., a property developer, was acting as general partner, that is correct.

Senator METZENBAUM. That is not the question. Now, answer my question. B&B owned the property did it not?

Mr. UNGER. To the best of my knowledge, B&B, the partnership, owned the property.

Senator METZENBAUM. And you got an order to sell the property of B&B, according to these gentlemen, in a bankruptcy case in which B&B was not a party on an ex part basis?

Mr. UNGER. Wrong. That is absolutely wrong, Senator.

Senator METZENBAUM. Did you get an order to sell their property?

Mr. UNGER. In an open hearing.

Senator METZENBAUM. And were they present in court?

Mr. UNGER. They were not creditors of Unit, Inc. If I could carry on, we might reach a point of agreement.

Senator METZENBAUM. They were the owners of the property. They did not have to be creditors. They were the owners of the property.

Mr. UNGER. They got notice before it—could I try to complete my explanation before we debate it, sir?

Senator METZENBAUM. Go ahead.

Mr. UNGER. At an open hearing with creditors present, the court concluded that it was in the best interest of the debtor in possession to sell the property. At the same time, the court recognized that the partnership agreement provided for approval of the limited partners and instructed the general partner that he should notify the limited partners that if they had an objection, they should come to court and state their objection.

At that point, these gentlemen did get their notice which was the appropriate time and place to do it. It was not ex parte. They were not a party to a contested proceeding. We did not have any filings between the two of us. There was not a case pending. There was nothing before the court at that point that would appropriately allow one to use the term "ex parte" as I understand the term.

They got a notice and an opportunity to come in and say why they would not approve and they did it very articulately and at great length. At that point, the court said it was not going to go forward with the sale. He listened to them. There were demands for discovery back and forth.

The potential buyer said he would withdraw his offer. The court said that was just too bad. . . . "These people have rights. I want to hear them. They got to be heard. There was no ex parte hearing." There was no problem anywhere along the line of unappropriate notice.

Then the next time they accuse me of an ex parte communication I would call your attention to the fact that the notice of a hearing to withdraw——

Senator SPECTER. Mr. Unger before you leave the first point, I would like to inquire about what you concluded to be the right, if any, of the limited partners to notice on an effort to sell the assets of the limited partnership.

The attorneys have contended that as a matter of contract, the limited parties were entitled to such notice. I have not reviewed all the documents. Are they correct that the contracts do give the limited partners a contractual right to notice before sale of assets?

Mr. UNGER. They had a right of approval of the sale which could not be unreasonably withheld, and that was the purpose of the letter that I just referred to you.

Senator HATCH. Did they also have a right under the Uniform Limited Partnership Act to receive notice?

Mr. UNGER. Yes. And they did receive that notice.

Senator SPECTER. Well, did they have such notice before the order was entered by Judge Gartner on the sale?

Mr. UNGER. The judge entered his order conditional upon their approval. We are in a chicken and egg game——

Senator SPECTER. The judge entered the order and said that the order would not be final for a period of time.

Mr. UNGER. Yes, sir.

Senator SPECTER. But my question is—and I know that they did receive the order, and they have recounted how they had 5 days or 7 days to act on it.

Mr. UNGER. Actually it was longer.

Senator SPECTER. Well, I do not care how long it was. I do not care about the order. I would like an answer to my question, and that is: Did they get notice before the application to the judge for the sale?

Mr. UNGER. No. Why should I notice them before I find out the judge would approve the sale?

Senator SPECTER. Well, I do not know that you should have; that is my inquiry.

Mr. UNGER. That is my answer. We did not notice them.

Senator SPECTER. They contend that you should have because of an obligation under the contract, or as Senator Hatch points out, under the Uniform Limited Partnership Act. But your interpretation is that you had no such obligation because any notice which was required was effected by the receipt of the judge's order.

Mr. UNGER. If there was no approval to sell by the court, any notice under the Uniform Partnership Act or otherwise would be ineffective. Unit could not sell without court approval. The court would have to prove the contract in the first instance.

Senator SPECTER. But your point is that there was no fraud because they had notice prior to the final approval of the sale. Is that your point?

Mr. UNGER. Yes, sir. It was a condition precedent to selling that Unit have court approval.

Senator HATCH. Am I correct, that they got notice and this matter has been in litigation ever since, because——

Mr. UNGER. To the best of my knowledge. I have not had much to do with it.

Senator HATCH. I see.

Senator SPECTER. And your point is that there is no crime and conversion because title did not change in derogation of their rights until the time set forth in the court order had elapsed.

Mr. UNGER. That is correct. They came within their time to convince the court that they had a basis for not approving. I understand subsequently another bankruptcy judge approved the sale and the sale has gone forward, but I know that only by hearsay. The second——

Senator HATCH. Wait a minute. You are saying, to just make sure I get this one point, that when you applied to have the sale considered, you did not know whether the judge was going to make the sale or not.

Mr. UNGER. That is right.

Senator HATCH. Or order the sale or not.

Mr. UNGER. Or whether the creditors may have objected.

Senator HATCH. But you did that in open court?

Mr. UNGER. Yes, sir.

Senator METZENBAUM. Without the other parties.

Senator HATCH. Were any other counsel there?

Mr. UNGER. Yes. At least one creditor was represented, as I remember, by counsel.

Senator METZENBAUM. But these people were not creditors.

Mr. UNGER. That is right, sir.

Senator METZENBAUM. These people were not represented.

Mr. UNGER. That is right, sir.

Senator METZENBAUM. These people owned the land independently, did they not?

Mr. UNGER. No; they did not own it independently. They were limited partners in a partnership that owned it.

Senator METZENBAUM. All right. But the title was in their name.

Mr. UNGER. The title was in the name of the partnership.

Senator METZENBAUM. OK. Which was B&B Properties.

Mr. UNGER. That is correct.

Senator METZENBAUM. And what you did in the bankruptcy case of Unit, Inc., is you got the court to execute an order without their being present authorizing the court to sell their property and you got the court to say, "In addition, this court has determined that this sale is in the best interest of B&B Properties as it is so material to the rehabilitation of Unit, Inc. Therefore, absent the most extraordinary reasons, it would be unreasonable for any limited partner of B&B Properties to withhold consent for this sale."

And what you did in that was, if they had never come back into court, you would have effectively taken away their property without ever having given them an opportunity for a day in court.

Mr. UNGER. That is not exactly precise, Senator. You make an assumption and then base your argument on an assumption.

Senator METZENBAUM. Tell me which assumption I am making.

Mr. UNGER. You are assuming that they got notice and did not act and, therefore, somehow I had wronged them.

Senator METZENBAUM. I am saying to you that I do not know that they got notice, because they did not testify that they got notice.

Mr. UNGER. How do you think they got there?

Senator METZENBAUM. Well, they got there after the fact, did they not?

Mr. UNGER. No; they did not get there after the fact.

Senator HATCH. They testified they had notice. They testified it was a short period of time. That was the point.

Mr. UNGER. It was a contingent order.

Senator METZENBAUM. Were they present on the 19th?

Mr. UNGER. No.

Senator METZENBAUM. Then they did not get there for that hearing, did they?

Mr. UNGER. No.

Senator METZENBAUM. You got an order signed at that time.

Mr. UNGER. Also, the Senator gives me great powers when he says I got the judge to do this, that, and the other.

Senator METZENBAUM. I believe you had those great powers.

Mr. UNGER. I appreciate that. I wish I had them more often.

Senator METZENBAUM. I am not sure you have quite as great powers with this committee.

Mr. UNGER. I hope I heard you correctly.

Now, there was no point in notifying a limited partner unless there was approval. There could have been objection by 1, 2, or 10 creditors or the court could have said it is a bad deal.

There was no point in doing that initially. What I did do was file on the open record and notify all the creditors that this application was before the court.

What the court did, not Sherman Unger, what the court did was to make a contingent approval of the sale based upon the fact that he wanted all the limited partners notified. He thought it was a good sale.

Senator SPECTER. Mr. Unger, as of June 19, 1980, the date of this sale, what direct and personal knowledge did you have, if any, that the limited partners would be notified?

Mr. UNGER. I pointed it out to the court that we needed their approval.

Senator SPECTER. Does that appear in any transcript?

Mr. UNGER. I am not sure it appears in any transcript. It certainly appears in the partnership agreement that I am sure the court had.

Senator SPECTER. It appears in the partnership agreement that you notified the court that the limited partners were to be notified? My question to you, Mr. Unger, is you said you pointed it out to the court that the limited partners were to be notified. And I am asking you does that appear in any transcript, and you are replying to me it appears in the limited partnership agreement. It does not appear in the limited partnership agreement that you notified the court of specific limited partners to be notified.

Mr. UNGER. The order of June 19, Mr. Kohn points out to me—I am sorry, the order setting the date of sale of July 25. It says:

> A hearing was held on June 19 pursuant to notice. Present were counsel for the debtor and a creditor representative, the latter who did not object. Counsel and the debtor reiterated at the hearing, much of which was averred to in the application.

Senator SPECTER. Where are you reading from, Mr. Unger?

Mr. UNGER. Tab No. 4, the bottom of the page, "Order with respect to sale of B&B Properties and fixing hearing date on objection to limited partners."

Senator SPECTER. Now, you are on a document dated July 24.

Mr. UNGER. July 25, I believe.

Senator SPECTER. That is not the order that the limited partners responded to. They responded to an order dated June 19.

Mr. Unger. If I may continue. A hearing was held on June 19 which I just read to you:

> Counsel for debtor reiterated at the hearing, much of which was averred to in the application. As a result, the court approved the application by the order of June 19 with full assurance and knowledge that the limited partners would be notified and given an opportunity to object to the transaction. They did, like a tornado.

Senator SPECTER. Whose language is that?

Mr. UNGER. It must be Judge Gartner's.

Senator SPECTER. Well, I know Judge Gartner signed it. Did he prepare it, to your knowledge?

Mr. UNGER. Yes.

Senator SPECTER. How do you know?

Mr. UNGER. It is not my style of writing. I can say I did not do it. I cannot guarantee you who did do it. I think someplace along there Judge Gartner had a clerk.

Senator SPECTER. Mr. Unger, let me return to my question. My question is, to your knowledge, what notice was given to the limited partners after this order of June 19, 1980?

Now, it is obvious that they had notice because they came in——

Mr. UNGER. Like a tornado, apparently.

Senator SPECTER. Let me get to the point, if I may, Mr. Unger. It is obvious that there is a recitation in this document dated July 24, 1980, that they came in. But what I am seeking to know is what you knew, as of June 19, 1980, about the procedures to give these limited partners notice.

Mr. UNGER. I knew that they needed to have notice. We needed their approval. I knew that their approval could not be unreasonably withheld, and as the court says in his order of the 25th, he issued his order of June 19 with full assurance and knowledge that the limited partners would be notified and given the opportunity to object.

Senator SPECTER. Well, that is the question I am posing, Mr. Unger. That is, what did you know about the notice that the limited partners would receive. They did get notice. Your defense to the charges of fraud and conversion is——

Mr. UNGER. I fail to recognize either one of those charges. I am not defending fraud or conversion, Senator.

Senator SPECTER. Well, that, Mr. Unger, is what has been charged in this room today. They have issued charges of fraud.

Mr. UNGER. They have immunity in this room today.

Senator SPECTER. That is true, but whatever their circumstances with immunity or not——

Mr. HAHALYAK. I will waive it.

Senator SPECTER [continuing]. Which I do not want to get into, they are charging fraud and conversion. And you have defended, and I think properly, on the highly technical grounds that there was not a completed sale so there could not be a fraud, and that there was not a completed sale so that title did not pass, and there was no conversion.

Now, they got notice, so I think that you have disproved their allegations of fraud and conversion. Now, what I am trying to determine is if you were responsible for or if you saw to it that they got that notice——

Mr. UNGER. Yes, sir.

Senator SPECTER [continuing]. Because this bears on a different issue than fraud or conversion. This bears upon the quality of your own conduct, and I am trying to get at what you did in one of two ways.

Did you give the limited partners notice or did you personally know that they were going to get notice——

Mr. UNGER. I told——

Senator SPECTER. Let me finish.

Because lots of times court documents are never delivered. A judge signs a court document and hands it to a clerk, and it may or may not get to a party. And if they had not received this document, they would not have known that they had to make an objection by June 30.

You were the attorney and the key operative party, much more so than Judge Gartner or a clerk or anybody who knew the provisions of the limited partnership agreement, and what I am trying to get at is your conduct, the quality of your conduct, without characterizing it, in seeing to it that the limited partners got notice, and what you knew would be done by way of giving them notice.

Mr. UNGER. I told the judge, first of all, that they had the right of approval and they needed to be noticed.

Senator SPECTER. When did you tell that to the judge?

Mr. UNGER. At the hearing.

Senator SPECTER. Does that appear anywhere in a transcript?

Mr. UNGER. I do not know if we have a transcript of that or not. The result is that the judge ordered the debtor in possession to notify them, putting both the debtor in possession's address on it and the U.S. bankruptcy court's address on it.

Senator SPECTER. Who is the debtor in possession?

Mr. UNGER. Unit, Inc.

Senator SPECTER. Who in Unit, Inc. then gave the limited partners the notice?

Mr. UNGER. B. W. Morris.

Senator SPECTER. How do we know that he did that?

Mr. UNGER. We have a copy of it in tab 6, and we also have the appearance of——

Senator SPECTER. You have a copy of it at Tab 6, you say?

Mr. UNGER. Yes, sir.

Senator SPECTER. Where in tab to 6? Let me try to follow this.

Mr. UNGER. Tab 6, June 19, 1980, to limited partners of B&B. And we also have Mr. Hahalyak and Mr. Berger's presence which means he must have been successful.

Senator SPECTER. And did you take any part in this notification?

Mr. UNGER. Are you asking me did I draft it?

Senator SPECTER. Whatever.

Mr. UNGER. I told my client to go do what the court ordered. I do not think I drafted this. I think Mr. Morris, the chairman of Unit, Inc., drafted it. This does not read like my writing. I have no recollection of having written it. I am sure he took the court order and did what he was supposed to do.

Senator SPECTER. Thank you very much.

Mr. UNGER. I assure you had he not done it and it had come to the court's attention, there would have been a trustee appointed and then some.

Senator METZENBAUM. That notice went out on June 19. It did not get to the limited partners until June 24, and they were obligated to respond by June 30.

Senator SPECTER. How do you know it got to the limited partners on June 24? It got to Mr. Unger's office on June 24.

Senator METZENBAUM. Oh, to Mr. Unger's office on June 24. You are right. I stand corrected.

Senator SPECTER. Do you know, Senator Metzenbaum, when the limited partners received it?

Senator METZENBAUM. I have no idea.

Senator HATCH. They testified. Did you not say 5 days?

Mr. HAHALYAK. Five days.

Senator HATCH. Five days before the 30th so about the 25th.

Mr. HAHALYAK. My secretary stamped it on the 25th as received.

Senator HATCH. So they had 5 day's notice and their complaint is that they did not have adequate notice, and 2 of those days were Saturday and Sunday, and it was an inconvenient thing for them. They had to get to Cincinnati and be heard. And were quite upset about it.

Go ahead.

Mr. UNGER. So it was put over. So it was set over to a subsequent hearing date.

Senator HATCH. So what you are saying is whether they had enough time or not, it was the same amount of time everybody else got. They did get there. They were able to raise their claims, and it is presently in litigation. You seem to recall by hearsay that the property was later sold anyway inspite of that.

Mr. UNGER. I understand, after the death of Judge Gartner and when I was here in Washington, another bankruptcy judge approved the sale and that there has been a sale. It has gone through.

Senator HATCH. Has that sale gone through, do you know?

Mr. HAHALYAK. Let me say that that statement is inaccurate.

Senator HATCH. Well, just tell us. If it has not gone through—he said it is hearsay.

Senator METZENBAUM. Give us the facts.

Mr. HAHALYAK. It is not correct. The order of the court was to sell the interest of Unit, Inc. They then took that order that gave them authority for Unit, Inc., and translated it to B&B. They distorted the picture entirely. They sold what they did not have.

Senator HATCH. When you say "they" who do you mean?

Mr. HAHALYAK. I am referring to Morris, Unit, Inc., acting through Morris and his counsel.

Mr. UNGER. I would respectfully suggest that I was General Counsel of the Department of Commerce at that time and not involved.

Senator HATCH. All right.

Mr. HAHALYAK. Then they sold it privately. When they were unsuccessful, they secretly sold it to the same people, knowing that they had no right to do it, and failing to get the consent either, as he said, that was required of the limited partners or of the bankruptcy court.

Senator HATCH. Mr. Hahalyak, what he is saying is he was not counsel at that time when that occurred.

Senator METZENBAUM. I am still not clear about one thing. Unit, Inc., at best owns 25 percent of B&B, is that right?

Mr. UNGER. I cannot give you the exact percentage, Senator.

Senator METZENBAUM. But at very best, it owns just a piece of B&B, is that correct?

Mr. UNGER. Yes, sir. I do not know that B&B exists any more. I do not want to mislead you.

Senator METZENBAUM. I do not care about that. I am talking about at the time. I am having difficulty in just understanding a very simple elementary fact. How do I, regardless of my relationship with any member of this committee or any other business operation, how do I get authority, if I go bankrupt or some corporation in which I have an investment goes bankrupt, how does that corporation get the right to sell an asset in which it only owns a very modest share—I just cannot follow that—without giving notice to other people?

What I do not understand is how you went into court and could prevail upon the court to give you an order to sell property that your client did not own, and I must say to you you are one hell of a persuader. I cannot comprehend that, and I cannot understand a judge who could do that.

Mr. UNGER. Senator, I thank you for the compliment, but it is only my failure of communication that allows you to say that. The order was contingent upon securing their approval or having it unreasonably withheld.

I did not secure an order of sale without notice and without approval.

Senator METZENBAUM. Say I own 10 percent of General Motors stock. Can I go in and get an order to sell the whole company conditioned upon getting the consent of the other 90 percent? That is what you did.

Mr. UNGER. No, sir; that is not what I did, but I thank you for the compliment.

Senator HATCH. Who was the general partner here?

Mr. UNGER. Unit, Inc. Unit, Inc. was in a chapter 11. Unit, Inc., being in chapter 11, was a real estate developer that operated——

Senator HATCH. So Unit, Inc. had the right to move as general partner.

Mr. UNGER. That is correct.

Senator HATCH. They had the power and the authority to act for the limited partners.

Mr. UNGER. No. You did not have the authority without court approval.

Senator HATCH. Well, I agree, but I mean they had a right to move for approval.

Mr. UNGER. Yes.

Senator **Metzenbaum**. A general partner does not have the right to sell all the assets.

Senator **Hatch**. No. Only the court could have allowed that, but what he has pointed out here is, if I understand it correctly, is that notice was given, albiet short notice in the eyes of Mr. Hahalyak and Mr. Berger.

Senator **Metzenbaum**. I do not want the chairman to be confused. That notice was given after June 19, after the order was executed.

Senator **Hatch**. Correct, and the judge gave the contingent order.

Mr. **Unger**. It was a contingent order, Senator Metzenbaum. You will agree to that.

Senator **Hatch**. That protected these people.

Senator **Metzenbaum**. I am saying to you a contingent order to sell property that is not owned by the person you represent is beyond my comprehension.

Mr. **Unger**. Let me try one more time so we may communicate.

Senator **Metzenbaum**. Go ahead.

Mr. **Unger**. Unit, Inc. was a real estate developer in chapter 11. It was a general partner of B&B. It had an offer that it negotiated for the sale of B&B. The first test was whether the sale was beneficial to the debtor in possession and satisfactory to its creditors.

Until we were able to get over that hurdle, there was no point in talking to any other limited partner seeking their approval because it could have been objected by any number of creditors or the court could have said it is a bad deal, "I will not approve it". It would have ended there.

We got to the point where the creditors did not object and the court approved. At that point, the court entered a contingent order approving the sale, contingent upon the approval or stated objection of the limited partners why they would not approve.

The limited partners notified them and there was a hearing on it. The net result of that hearing was that the sale was delayed, and in fact, there was no sale. And if I can move to the next error in Mr. Hahalyak and Mr. Berger's testimony, I would appreciate doing it, but I will respond to any question we have here.

I do not mean to cut you short.

Senator **Metzenbaum**. You are not cutting me short, but I do not see—where is the order itself, which tab? Is that tab No. 5? Is that the order?

Mr. **Unger**. Yes, sir.

Senator **Metzenbaum**. Now, let us be very realistic now on what you did do. You got an order that said, first of all, the court has made a determination absent the presence of B&B that the court determines that the sale is in the best interest of B&B and then absent the most extraordinary reasons it would be unreasonable for any limited partner to withhold consent.

You then go on and the court goes on and order that the debtor's application or authorization for the sale is sustained, and because the sale is of such importance Unit is directed to proceed with the sale in accordance with the terms of the land contract.

It goes on to say further ordered, "inasmuch as the court finds that the sale is fair, reasonable and material to the rehabilitation of Unit, Inc.," not of B&B, of Unit, Inc.

And as this court finds that absent an extraordinary reason, it would be unreasonable for any limited partner of B&B properties to withhold consent for this sale. Any limited partner seeking to withhold consent is directed to notify Unit, Inc., and this court of his decision to withhold consent prior to June 30, 1980. Absent any such notification, all limited partners of B&B Properties will be deemed to have consented to this sale.

Now, Mr. Unger, what you said to the limited partners by obtaining that order is that you have an uphill battle. I, the court, have already decided the issue, that it is fair, that it is proper, that it is in your best interest, and that any objection on your part would be unreasonable. But if you want, and you can get in in the next 4 or 5 days, we will give you a chance to be heard. Do you think that that is a way to practice law?

Mr. UNGER. The partnership agreement said that approval would not be unreasonably withheld, and there is a difference between being a judge and being an advocate.

Senator METZENBAUM. But you prevailed upon this court to enter that order without letting those limited partners have any day in court, and 4 or 5 days later they have to run down. If they happened to be on vacation, they would have been precluded.

Mr. UNGER. Senator, there were enough of them. They would have been represented. Let me point out to you that Mr. Hahalyak and Berger showed up with a whole lot of authorizations. They did not show up just representing themselves.

Senator METZENBAUM. Let me point out to you, Mr. Unger, that I think that your conduct in this matter if for no other reason would indicate to me sort of a lack of judicial temperament, of fairness, of equity, of integrity, and I do not understand how you practice law, and I practiced law all my life.

Mr. UNGER. Well, I recognize you do not understand how I practice law.

Senator METZENBAUM. I certainly do not.

Mr. UNGER. We may have a mutuality of interest here, sir.

Senator METZENBAUM. This is not being a strong advocate. This is going far beyond the rules of propriety.

Mr. UNGER. We have a disagreement. The court set the order.

Senator METZENBAUM. You prevailed upon him to set that order without anyone being present to argue to the contrary.

Mr. UNGER. As I have tried to explain to you, and I will try again——

Senator METZENBAUM. You have not explained to me why they were not permitted to be present at the first hearing.

Mr. UNGER. Because it was inappropriate. We did not have approval yet for the sale.

Senator METZENBAUM. That is not the way——

Senator HATCH. What he is saying is the question was not ripe. Now, the only problem I see is that it could be criticized that a 5-day notice was not enough. The court should have, in my opinion, said, "Well, is this enough time to get the mail out to people like Mr. Hahalyak and Mr. Berger?" Now, if you want to criticize that, and I think you are——

Senator METZENBAUM. Mr. Chairman, you miss the point.

Senator HATCH. No, I do not think I missed the point.

Senator METZENBAUM. The point that I am making is that those people had the right to be present at the first hearing and that once the order was entered you provided the limited partners with an uphill battle in order to try to get back in the ballgame, and you gave them 5 days in which to do it.

Mr. UNGER. They succeeded.

Senator HATCH. I do nct agree with that.

Go ahead.

Mr. UNGER. They succeeded as I am sure the Senator is aware. Let me, if I may, pass on to another point. I would be pleased to come back to this point.

Senator HATCH. Wait a second. Why is it that Senator Metzenbaum is wrong on that particular issue, in your opinion? The limited partners, he claims, should have been there at that particular hearing.

Now, tell me. Am I right in saying that that issue was not ripe at that point and only became ripe when the judge entered into this contingent order that would not go anywhere without giving notice to the partners?

Mr. UNGER. We had no knowledge whether the sale would be approved nor did we have knowledge whether any creditor would object and tie it up. It was a limited time offer, and it certainly was premature to talk to anybody until we had both approval of the creditors and of the court.

Senator HATCH. You are saying that all limited partners were notified.

Mr. UNGER. That is correct.

Senator HATCH. They then all came in.

Mr. UNGER. A great majority of them did. I do not know if all of them did.

Senator HATCH. I think Mr. Hahalyak and Mr. Berger testified that this presently in litigation.

Mr. UNGER. It sounded to me this afternoon like it is still in litigation. I just thought it was premature to notify them, Senator. I do not think that was unethical, and I do not think that was an inappropriate way to approach the problem.

Senator METZENBAUM. You are saying it was proper to get an order to sell——

Mr. UNGER. A contingent order. Would you interject that word, please?

Senator METZENBAUM. Yes, but you added something in it. In the court's order you added more than just a matter of refusal on the part of the limited partners because the court's order actually places the limited partners under very difficult circumstances. It already has decided the issue, and it says, "This court finds that absent an extraordinary reason it would be unreasonable for any limited partner of B&B Properties to withhold consent for this sale." And as a matter of fact, the judge was following the memorandum of law that you filed but the limited partners were not given a chance to brief the opposite side of that question. Were they?

Mr. UNGER. They were. They did.

Senator METZENBAUM. After the fact.

Mr. UNGER. After what fact?

Senator METZENBAUM. After the order.

Mr. UNGER. After the contingent order.

Senator HATCH. What would the burden have been anyway? Who would have had the burden?

Mr. UNGER. The limited partners had a burden to prove—a burden to come forward to prove that if they did not approve the sale, it had to be for a reason that was not unreasonable. The partnership agreement said their approval should not be unreasonably withheld, as I remember the agreement.

Senator SPECTER. Mr. Unger, was there any consideration in your mind of utilizing this procedure to place the limited partners at any type of disadvantage, however slight, in objecting to this sale?

Mr. UNGER. No, I did not think so.

Senator SPECTER. You had no such intention?

Mr. UNGER. No, I do not think so. I think they had every right to come in and if they——

Senator SPECTER. But you had no intention of triggering a procedure which would disadvantage the limited partners?

Mr. UNGER. No. I was doing things by the steps.

Senator SPECTER. In fact, it would have been to their benefit because it might have spared them the expense of coming to an unnecessary hearing.

Mr. UNGER. That is absolutely correct. I had no reason to know that I was going to walk out of there with any order.

Senator SPECTER. Did you consider giving them the option to decide whether or not they would come to an unnecessary hearing?

Mr. UNGER. That could be so.

Senator SPECTER. This confirmation hearing aside, if you had this one to do over, would you do it just this way?

Mr. UNGER. I would probably suggest to the court that he give them longer notice, frankly. There really are difficulties getting approval to sell something out of a bankruptcy court.

Senator SPECTER. With Judge Gartner?

Mr. UNGER. Yes, I have had him refuse.

Senator HATCH. Mr. Unger, what you did was probably procedurally correct and legally sound. I think if you had to do it over, working in a security situation like this, a limited partnership situation, you probably would notify everybody at every step of the way. However, you did not have a legal obligation to do that. I think that is what you are saying at that point in time.

Mr. UNGER. I probably would have suggested a longer notice, because I really just was not sure what I was going to walk out of there with and whether it was a good deal. I did not negotiate the deal. I am not a real estate man. I took the contract. My client said it was a good deal. My client explained to the court why it was a good deal, and if I can ever get to the next point, I tried to withdraw the whole thing when there were objections and let the other people fight it out. At that point, Messrs. Berger and Hahalyak say I ex-parte-ed my withdrawal application, except if I can possibly call your attention——

Senator SPECTER. But, Mr. Unger, does your effort to withdraw have any relevance to whether you crossed the line in your practices in obtaining this order?

Mr. UNGER. It has relevance to their other comment. What line does the Senator suggest I crossed?

Senator SPECTER. I am not suggesting you crossed the line. We are trying to determine whether you did.

Mr. UNGER. I do not think I did. I think I needed to get court approval first.

Senator METZENBAUM. Did it upset you that the limited partners would put in $548,000 and were only going to get $100,000 out of this whereas the general partner, Unit, Inc., would get $500,000, that did not bother you?

Mr. UNGER. I would suggest a more careful reading of the order first. Second, I would suggest to you, and I know the Senator is a tax expert, that there was a great negative basis that these limited partners had, and that is why they did not want the sale.

Senator SPECTER. Mr. Chairman, may I make an inquiry of the Chair? This hearing has been in session for something more than 4 hours. I have already rearranged several items on my agenda, as I am sure you have. I had anticipated an extensive hearing, perhaps 2, 2½ hours. I am going to have to leave shortly before 6, and I am committed to be present at all these hearings.

Does the Chair have any idea of the time?

Senator HATCH. My feeling is that we hold all questions and let him finish his statement.

Senator METZENBAUM. How much more time, Mr. Chairman?

Senator HATCH. Well, as much time as he needs. He has had the least amount of time of a number of witnesses.

Mr. UNGER. I have not gotten to my rebuttal yet.

Senator SPECTER. I think Mr. Unger is entitled to all the time he wants, Mr. Chairman, I agree with that, but I would like to know how long we are going to sit.

Senator HATCH. We have 55 minutes before you have to leave.

Mr. UNGER. Could I go forward with my explanation and then answer questions?

Senator HATCH. Let us withhold questions until Mr. Unger finishes and then let us see where we go from there. I had hoped that we would finish this today. If we do not finish it today, then I would hope that we would be able to do so tomorrow.

Mr. UNGER. If I may try to hurry through my response to Messrs. Hahalyak and Berger. They say that I filed an application ex parte to withdraw, and I would simply call your attention to tab 7 and tab 8, tab 7, Application to Withdraw, and the memorandum of law that is attached to it, and more specifically, I would like to read this for the record, and call Senator Metzenbaum's attention to it.

"I hereby certify that on the 11th day of August a copy of the foregoing application to withdraw and memorandum in support have been served upon Morris Berger, Esquire, and Michael Hahalyak, Esquire, by placing a copy of the same postage prepaid in the U.S. mail addressed to them at" their respective addresses, et cetera. That is notice; that is not ex parte. Their statement that my application to withdraw was ex parte is clearly erroneous. They objected to my withdrawing. There was never a withdrawal. The judge held the whole thing in suspense.

So again, I think we have a situation where they are less than——

Mr. **Hahalyak**. Mr. Chairman, I hate to interrupt. I hope I have a right to rebuttal, because there are certain statements here that I want to make sure you are aware of.

Senator **Hatch**. Mr. Hahalyak, we will leave this record open until Monday, and you can submit anything in writing you would like.

Mr. **Hahalyak**. I would like to after he is through.

Senator **Hatch**. You can see we do not have time. We are going to listen to his testimony. I will leave the record open for you to submit anything you would like in writing, but we are going to finish this today if we can.

Mr. **Unger**. I would like to submit this entire response for the record with this attachment to show the certificate of service attached.

Senator **Hatch**. Without objection, we will put it in the record.

[Supplemental statement follows:]

SUPPLEMENTAL STATEMENT OF

SHERMAN E. UNGER

BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NOMINATION OF SHERMAN EDWARD UNGER AS
UNITED STATES CIRCUIT JUDGE FOR THE
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

October 27, 1983

PREFACE

Testimony has been submitted on behalf of the American Bar Association in opposition to my nomination as U.S. Circuit Judge for the Court of Appeals for the Federal Circuit. I believe it appropriate for the Judiciary Committee to consider this testimony in the context of Canon 8 of the American Bar Association's Model Code of Professional Responsibility with particular attention to Ethical Consideration 8-6 and Disciplinary Rule 1-103. I have included these provisions as a preface to my statement.

Much of the testimony submitted in support of the ABA opposition to my nomination fails to comply with the standard of EC 8-6. In fact, several comments by those in opposition to my nomination are not factual and may be in violation of DR 1-102(A).

PREFACE

A. Ethical Consideration, ABA Model Code of Professional Responsibility

EC 8-6 Judges and administrative officials having adjudicatory powers ought to be persons of integrity, competence, and suitable temperament. Generally, lawyers are qualified, by personal observation or investigation, to evaluate the qualifications of persons seeking or being considered for such public offices, and for this reason they have a special responsibility to aid in the selection of only those who are qualified. It is the duty of lawyers to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. Lawyers should protest earnestly against the appointment or election of those who are unsuited for the bench and strive to have elected or appointed thereto only those who are willing to forego pursuits, whether of a business, political, or other nature, that may interfere with the free and fair consideration of questions presented for adjudication. Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly, *he should be certain of the merit of his complaint, use appropriate language*, and *avoid petty criticisms*, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. *Criticisms motivated by reasons other than a desire to improve the legal system are not justified*. (Emphasis supplied.)

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ABA Model Code of Professional Responsibility

B. Disciplinary Rules,
ABA Model Code of Professional Responsibility

I.

1. Paragraph 10, Statement of Paul P. Welsh, dated October 5, 1983.
2. Ethical Consideration 8-6, Canon 8, ABA Model Code of Professional Responsibility, as amended, February 17, 1979.
3. February 23, 1980 letter from Andrew G.T. Moore, II to Sherman E. Unger.
4. Excerpts of testimony of the Honorable Leonard C. Gartner, U.S. Bankruptcy Judge, in hearing before the Honorable Walter. K. Stapleton, U.S. District Judge, U.S. District Court for the District of Delaware, in Ex. 11, Statement of William T. Coleman, Jr., on behalf of the American Bar Association, before the Committee on the Judiciary, United States Senate, September 29, 1983, pages 11-15, 42-44.
5. October 5, 1983 Affidavit of Bonita Buerk.
6. Excerpts of testimony of the Honorable Leonard C. Gartner, in hearing before the Honorable Walter K. Stapleton, in Ex. 11, Statement of William T. Coleman, Jr., on behalf of the American Bar Association, before the Committee on the Judiciary, United States Senate, September 29, 1983, pp. 11-12.
7. Excerpts of testimony of J. Vincent Aug, before the Committee on the Judiciary, United States Senate, September 29, 1983, pp. 208-211.
8. January 15, 1983 Affidavit of Bonita Buerk.
9. Report of the Committee of the Judiciary, Bankruptcy Law Revision, H.R. Rep. No. 95-595, 95th Cong., 1st Sess. ("House Report") 91 (1977), U.S. Code Cong. & Admin. News, 1978, pp. 6049-6053.
10. Excerpts of testimony of the Honorable Leonard C. Gartner in hearing before the Honorable Walter K. Stapleton, Ex. 11, Statement of William T. Coleman, Jr. on behalf of the American Bar Association, before the Committee on the Judiciary, United States Senate, September 29, 1983, pp. 19-20.
11. July 26, 1977 Sua Sponte Order of the Honorable Leonard C. Gartner.
12. Canon 3(A)(4), ABA Model Code of Judicial Conduct, as amended, February 17, 1979.
13. Disciplinary Rule 7-110(B), Canon 7, ABA Model Code of Professional Responsibility, as amended, February 17, 1979.

II.

14. November 16, 1982 letter from Jonathan C. Rose to Sherman E. Unger.

15. November 18, 1982 letter from Sherman E. Unger to Jonathan C. Rose.

16. January 13, 1972 Internal Revenue Service Report.

17. October 14, 1983 and September 14, 1970 Affidavits of Paul W. Eggers.

III.

18. a. September 22, 1983 letter from Robert L. Keeler to the Honorable Strom Thurmond.

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19. Memorandum and Certification regarding Robert L. Keeler, filed July 12, 1968 by the Honorable C.G. Neese.

20. May 25, 1979 Order Granting Sanctions Against Pittsburgh National Bank, entered by the Honorable Leonard C. Gartner.

21. September 21, 1982 letter from Jay A. Rosenberg to William T. Coleman, Jr.

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IV.

23. October 13, 1983 letter from Sherman E. Unger to the Honorable Strom Thurmond.

24. Transcript of hearing before the Honorable Walter K. Stapleton in Freidco of Wilmington, Delaware, Ltd. v. The Farmers Bank, C.A. No. 76-149 (D.C., Del. 1980).

25. Testimony of the Honorable Malcolm Baldrige, Secretary of Commerce, unedited, September 29, 1983.

26. Statement of the Honorable Griffin B. Bell, as submitted, before the Committee on the Judiciary, United States Senate, September 29, 1983.

27. Statement of the Honorable Lloyd N. Cutler, as submitted, before the Committee on the Judiciary, United States Senate, September 29, 1983.

28. Letters and Affidavits sent to the American Bar Association but not included in their Exhibits.

    a. December 3, 1982 letter from Robert Taft, Jr. to William T. Coleman, Jr.

    b. November 17, 1982 letter from Hugh Scott to William T. Coleman, Jr.

- c. November 2, 1982 letter from Lloyd N. Cutler to William T. Coleman, Jr.
- d. December 3, 1982 letter from the Honorable Mark P. Painter to Lewis Van Dusen.
- e. October 29, 1982 letter from Bernard H. Barnett to William T. Coleman, Jr.
- f. November 1, 1982 Affidavit of Jerry L. Cowan.

29. Letters and Affidavits provided to the Senate Committee on the Judiciary.
    - a. September 22, 1983 Affidavit of John L. Muething.
    - b. December 30, 1982 Affidavit of John L. Muething.
    - c. September 27, 1983 letter from Edward C. Schmults to the Honorable Strom Thurmond.
    - d. September 23, 1983 letter from Dennis W. Archer to the Honorable Strom Thurmond.
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    - g. September 9, 1983 letter from J. Vincent Aug to the Honorable Strom Thurmond.
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    - i. May 5, 1983 letter from the Honorable Malcolm Baldrige to the Honorable Strom Thurmond.
    - j. May 26, 1983 letter from Edward A. McCabe to the Honorable Strom Thurmond.
    - k. May 9, 1983 letter from Lloyd N. Cutler to the Honorable Strom Thurmond.
    - l. May 5, 1983 letter from Griffin B. Bell to the Honorable Strom Thurmond.
    - m. January 3, 1983 letter from Arnold Morelli to the Honorable Strom Thurmond.
    - n. July 15, 1983 letter from Richard H. Ward to the Honorable Strom Thurmond.
    - o. July 15, 1983 letter from Richard H. Ward to the Honorable Howard Metzenbaum.
    - p. August 26, 1983 letter from the Honorable William S. Thompson to the Honorable Strom Thurmond.

q. August 26, 1983 letter from the Honorable William S. Thompson to the Honorable William French Smith.

r. January 14, 1983 letter from William A. McClain to all members of the Senate Judiciary Committee.

s. May 10, 1983 letter from the Honorable Louis J. Schwartz to the Honorable Strom Thurmond.

t. May 26, 1983 letter from Alvin Eugene White to the Honorable Howard Metzenbaum.

u. May 26, 1983 letter from Alvin Eugene White to the Honorable John Glenn.

v. July 6, 1983 letter from William R. Seaman to the Honorable Howard Metzenbaum.

w. January 26, 1983 letter from Gerald J. Mossinghoff to Sherman E. Unger.

B. Disciplinary Rules, ABA Model Code of Professional Responsibility

DR 1-102 Misconduct.

(A) A lawyer shall not:

- (1) Violate a Disciplinary Rule.
- (2) Circumvent a Disciplinary Rule through actions of another.
- (3) Engage in illegal conduct involving moral turpitude.
- (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
- (5) Engage in conduct that is prejudicial to the administration of justice.
- (6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 1-103 Disclosure of Information to Authorities.

(A) A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation. (Emphasis supplied.)

(B) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.

The most serious charge made to the Committee consists of allegations by Mr. Coleman, representing the ABA, and Mr. Welsh, whose statement was adopted and introduced into the record by the ABA.[1/] Mr. Welsh suggested that I suborned a judge by an ex parte contact with him concerning a case in which I was counsel in his court.

During his testimony Mr. Coleman suggested the existence of ex parte contacts other than the single incident the ABA asserted in its submission to the Judiciary Committee.[2/] He argued that the ABA submission and his testimony impose on the Committee a duty to investigate complaints of unidentified attorneys in unspecified cases who alleged ex parte contacts by me.[3/]

On October 5th, Mr. Coleman submitted to the Committee Mr. Welsh's statement which asserts Mr. Welsh's "suspicion"[4/] of a "relationship" between Judge Gartner and me that presumes outright bribery of Judge Gartner by me in return for favorable judicial rulings on fee applications and the merits of cases in which I appeared before him.[5/] This statement of "suspicion" is both unfounded and totally incompatible with Ethical Consideration 8-6 which is made a part hereof in Exhibit 2.[6/] The reckless and intemperate language of Mr. Welsh's statement does much to explain Justice Moore's characterization of his conduct during the litigation he and I contested.[7/]

[1/] Testimony of William T. Coleman, Jr., on behalf of the American Bar Association, before the Committee on the Judiciary, United States Senate, October 5, 1983, unedited, at 13.

[2/] Testimony of William T. Coleman, Jr., supra, September 29, 1983, unedited, pp. 66, 67.

[3/] Id., at 62-71, 98-101, 159-165.

[4/] See, Exhibit 1, ¶10, Statement of Paul P. Welsh, as submitted, before the Committee on the Judiciary, United States Senate, October 5, 1983, at 13.

[5/] Mr. Welsh's statement would be actionable were it not protected for use in a proceeding before this Committee. See W. Prosser, The Law of Torts, § 114, at 781-82 (4th ed. 1971); Restatement (Second) of Torts § 590A (1977).

[6/] See, Exhibit 2, Ethical Consideration 8-6, Canon 8, ABA Model Code of Professional Responsibility, as amended, February 17, 1979; see, also, Disciplinary Rule 8-102(A), Canon 8, ABA Model Code of Professional Responsibility, as amended, February 17, 1979.

[7/] See Exhibit 3, Letter from the Honorable Andrew G.T. Moore, II, Justice Supreme Court of Delaware, to Sherman E. Unger, dated February 23, 1980, as submitted to the Committee on the Judiciary, United States Senate, October 5, 1983.

The evidence put before this Committee involves only a single ex parte contact between me and a judge hearing a case in which I was counsel. The material facts concerning this incident are extremely complicated and arose out of the following circumstances.

I was a practicing attorney in Cincinnati, Ohio and the Honorable Leonard C. Gartner (now deceased) was a United States Bankruptcy Judge for the Southern District of Ohio, Western Division. I was in Judge Gartner's court in a Chapter XI proceeding as counsel for Unit, Inc., a Texas corporation with diverse property and management interests throughout the United States. The property and management interests of Unit, Inc., gave rise to a series of bankruptcy reorganizations out of which arose complex litigation in several states, particularly Ohio and Delaware. Generally, each proceeding in bankruptcy dealt with partnerships in which Unit, Inc., had either a general or limited partnership interest, and the complex litigation that arose involved the assets, or the control of the assets, of these various partnerships.

Freidco of Wilmington, Delaware, Ltd. was a Delaware partnership in which Unit, Inc., had a 71 percent general partnership interest. Freidco had filed for a Chapter XII reorganization which was being heard in Delaware and was continuing its business operations as debtor-in-possession, i.e., managing its own assets during the reorganization. Unit, Inc., received $2,500 a month pursuant to a management agreement it had with Freidco. This management agreement with Freidco, and the income derived therefrom, was reflected in Unit's monthly income statement, as filed with the court in its Chapter XI proceeding in Ohio.

I served "of counsel" in Delaware with respect to Freidco's Chapter XII reorganization proceeding, and matters arising out of its continuing operations as debtor-in-possession. The particular hearing in the Freidco bankruptcy proceeding which led directly to the ex parte contact between me and Judge Gartner concerned the requested appointment of a trustee for Freidco made by two Freidco partners (each of whom had a 10% interest in Freidco) and the

Farmers Bank who asserted that Unit, Inc., as general partner in Freidco, was diverting funds of Freidco to its own use. In July 1977, the bankruptcy court in Delaware appointed a trustee for Freidco.

Immediately thereafter Jay Rosenberg, who represented a creditor of Scioto Park, a partnership in which Unit, Inc., had a general partnership interest, and which I represented as counsel in a Chapter XII proceeding before Judge Gartner gave Judge Gartner a copy of the order of the Delaware bankruptcy court appointing a trustee for Freidco. Jay Rosenberg gave Judge Gartner a copy of that order because the findings of that order by the bankruptcy court in Delaware could be urged as a basis for Judge Gartner to appoint a trustee in the Chapter XII proceeding involving Scioto Park -- a result which Jay Rosenberg wanted to obtain.

After reading the Delaware bankruptcy court order furnished to him by Jay Rosenberg, Judge Gartner became first concerned about the conduct of Unit, Inc., and then about whether the income and equity of Unit, Inc., before him in a Chapter XI proceeding, was being needlessly dissipated in another jurisdiction.8/ In point of fact, the ultimate cost of trustee services and his counsel in Freidco was $475,000.00.9/

The affidavits of Bonita Buerk, Judge Gartner's secretary, and the testimony of Judge Gartner establish that after learning of the appointment of the trustee for Freidco by the Delaware bankruptcy court, Judge Gartner summoned me to his chambers and

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8/ See, Exhibit 4, Transcript of testimony of the Honorable Leonard C. Gartner, U.S. Bankruptcy Judge, in hearing before the Honorable Walter K. Stapleton, U.S. District Judge, U.S. District Court for the District of Delaware, Ex. 11, Statement of William T. Coleman, Jr., on behalf of the American Bar Association, supra, at 11-15.

9/ Per court order entered in Freidco proceedings for compensation of the trustee and his legal counsel.

grilled me for about an hour on the affairs of Freidco in Delaware.[10]

Judge Gartner perceived this meeting as an administrative conference.[11] He clearly expressed his concern regarding the effect of the Delaware order on the administration of the Unit, Inc. proceeding.[12] The testimony of J. Vincent Aug and the affidavit of Bonita Buerk confirm that it was Judge Gartner's practice to meet with attorneys and trustees in bankruptcy cases regarding administrative matters.[13] It was Judge Gartner's custom to have such meetings *ex parte* in chambers.[14] Such administrative conferences were a common practice of bankruptcy judges prior to the 1978 Bankruptcy Reform Act.[15]

Judge Gartner perceived the order of the Delaware bankruptcy court in Freidco as an attack on his administration of Unit, Inc. (as he later stated in his order of July 26, 1977) and pursuant to his custom and the practice of bankruptcy judges nationwide in 1977, he summoned me to his chambers for an administrative conference.[16]

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[10] *See*, Exhibit 5, *Affidavit of Bonita Buerk*, dated October 5, 1983, as filed with the Committee on the Judiciary, United States Senate, in hearings regarding the nomination of Sherman Edward Unger as United States Circuit Judge for the United States Court of Appeals for the Federal Circuit; *see also*, Exhibit 6, *Transcript of testimony of the Honorable Leonard C. Gartner*, *supra*, pp. 11, 12.

[11] *See*, Exhibit 4, *Transcript of testimony of the Honorable Leonard C. Gartner*, *supra*, pp. 11-15; 42-44.

[12] *Id*. at 15.

[13] *See*, Exhibit 7, *Testimony of J. Vincent Aug*, before the Committee on the Judiciary, United States Senate, unedited, September 29, 1983, in hearings regarding the nomination of Sherman Edward Unger as United States Circuit Judge for the United States Court of Appeals for the Federal Circuit, pp. 208-211.

[14] *See*, Exhibit 8, *Affidavit of Bonita Buerk*, dated January 15, 1983, as submitted, October 5, 1983, to the Committee on the Judiciary on behalf of the nomination of Sherman Edward Unger, as United States Circuit Judge for the United States Court of Appeals for the Federal Circuit.

[15] *See*, Exhibit 9, *Report of the Committee of the Judiciary*, Bankruptcy Law Revision H.R. Rep. No. 95-595, 95th Cong., 1st Sess. ("House Report") 91 (1977), U.S. Code Cong. & Admin. News, 1978, pp. 6049-6053.

[16] *See*, Exhibit 5, *Affidavit of Bonita Buerk*, dated October 5, 1983, *supra*, at ¶3.

At this meeting, Judge Gartner directed me to draft an application for reconsideration of a previous application to consolidate the Unit, Inc. and Freidco proceedings before him in Ohio.[17] I left the judge's chambers and returned to my office to draft the application and a supporting memorandum of law. I delivered both documents to Judge Gartner several hours later. While reviewing the application for reconsideration Judge Gartner asked whether I had prepared a draft order. I called my associate, Michael Kohn, and asked him to prepare and deliver an order. Within a short time, Mr. Kohn delivered an original of a rough draft order to Judge Gartner which he rejected. Judge Gartner than thanked Mr. Kohn and me and dismissed us.

On July 14, 1977, Judge Gartner entered an order vacating a prior order entered January 7, 1976, by him, overruling the motion of Unit, Inc. to transfer the Freidco proceedings to the Southern District of Ohio, Western Division. Opposing counsel obtained a TRO in Delaware staying that order. After the temporary restraining order which enjoined his July 14, 1977 order had lapsed, Judge Gartner entered a *sua sponte* order on July 26, 1977, to clarify his previous order as well as to protect his jurisdiction over the Unit, Inc. proceedings.[18]

THE DUTY OF THE ATTORNEY AT AN *EX PARTE* CONFERENCE

Canon 3(A)(4) of the Code of Judicial Conduct cautions a judge from participating in *ex parte* communications unless such communications are *authorized by law*.[19] (Emphasis added.) An ex parte communication is authorized by law if the judge perceives that there exists a practical necessity for such communication in furtherance of his duties and responsibilities for the effective administration of a case and if such ex parte communications will not involve discussions of the underlying substantive issues. See, In re Parr Meadows Racing Assoc., Inc., 5 B.R. 564 (1980). In application, Canon 3(A)(4) permits the judge to effectively administer the nonsubstantive aspects of a case as well as permitting him to fulfill his varied responsibilities as an officer of the court. See, generally, United States v. Mitchell, 377 F. Supp. 1312, (D.D.C., 1974).

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[17] *See*, Exhibit 4, *Transcript of testimony of the Honorable Leonard C. Gartner*, *supra*, at 11.

[18] *See*, Exhibit 10, *Transcript of testimony of the Honorable Leonard C. Gartner*, *supra*, pp. 19-20; *see also*, Exhibit 11, *Sua Sponte* Order of the Honorable Leonard C. Gartner dated July 26, 1977.

[19] *See*, Exhibit 12, Canon 3(A)(4), ABA Model Code of Judicial Conduct, as amended, (Feb. 1979).

An attorney is prohibited from participating in ex parte communications with a presiding judge or official in an adversary proceeding pursuant to Disciplinary Rule 7-110(B) of Canon 7, Code of Professional Responsibility.20/ An exception is provided to permit an ex parte discussion with a presiding judge or official in an adversary proceeding ". . . as authorized by law, ..." D.R. 7-110(B), Canon 7, Code of Professional Responsibility. This permits an attorney requested to attend an ex parte conference with a judge presiding in a pending proceeding to attend if he believes the judge will keep the subject matter of the conference within the bounds of his apparent authority -- an ex parte discussion "authorized by law". Only when it is clear that the ex parte conference has reached the underlying substantive issues of the case is the attorney under a duty to remind the judge of his ethical responsibilities to include the opposing attorney in discussions of these substantive issues. One should not lightly impute such a duty to an attorney in conference with a judge before whom he must regularly appear.

Prior to the Bankruptcy Reform Act of 1978, bankruptcy judges were vested with judicial and administrative responsibilities. Although responsible for the proper disposition of all contested matters arising from the debtor's petition for relief, the bankruptcy judge was equally concerned with the effective administration of the debtor's estate. As a result, frequent ex parte

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20/ See, Exhibit 13, Disciplinary Rule 7-110(B), Canon 7, Trial Conduct, ABA Model Code of Professional Responsibility, as amended (Feb., 1979).

communications with debtor's counsel and the estate's trustee were required, and were perceived by the judge as authorized -- being in furtherance of his duties and responsibilities under the Bankruptcy Act.

Although the Bankruptcy Reform Act of 1978, was intended to resolve any perception of bias arising from the bankruptcy judge's role as administrator and adjudicator, ex parte contacts occurring after the Reform Act, between a bankruptcy judge and participants in a bankruptcy proceeding have not been viewed as per se improper. Canon 3(A)(4); see generally, 28 U.S.C. §§ 144 and 455; see also, In re Parr Meadows Racing Assoc., Inc., 5 B.R. 564 (1980). It is significant to note that my discussion with Judge Gartner was prior to the enactment of the Reform Act.

I think it clear I did not violate the Canon of Ethics or any Disciplinary Rule when I responded to Judge Gartner's request for an ex parte conference as to the effect of the order issued by the bankruptcy court in Delaware on Unit, Inc., a debtor in Chapter XI before Judge Gartner. Both Judge Gartner and I have testified under oath that our discussion was precipitated by the entry of an order in the Freidco matter which had a direct impact on the administration of the Unit, Inc., proceedings. Both of us believed that our discussions arose in a proper administrative context. The closer question is whether at some point in the conference -- when it became clear that Judge Gartner's desire to protect his administration of that income and those assets of Unit., Inc., that were located in Delaware would require him to consider and to act on a substantive matter -- there was a duty on me to suggest the need to have opposing counsel present before we proceeded. In truth, at that time it never occurred to me that I might be obligated to do so. The matter we were discussing was related to procedure in the administration of an estate in Chapter XI before Judge Gartner. The Judge's conduct seemed to me authorized by law.

It is not of great import whether the ex parte conference with Judge Gartner, and the preparation and submission of the pleadings he requested, was, in fact a proper exercise of his administrative responsibility under the Bankruptcy Act -- and so authorized by law. The question is whether Judge Gartner believed that his discussion with me was a proper exercise of those administrative responsibilities under the Bankruptcy Act as it then existed and whether as a competent lawyer in Judge Gartner's court in Ohio I reasonably could accept his judgment of what he was authorized by law to discuss in such a conference.

Judge Gartner's testimony and more particularly his subsequent sua sponte order in this case establish beyond any doubt his subjective belief that he had the authority to do what he did as a proper exercise of his administrative responsibility under the Bankruptcy Act.

When Judge Gartner first called me to his chambers, he sought to learn about the background of the order appointing the Freidco trustee. He also sought to ascertain the effect of the trustee's appointment on the viability of the Unit estate, which had been receiving a management fee of $2,500 per month from Freidco. This conversation was clearly within the administrative purview of the bankruptcy judges in 1977.

At some point, the conversation turned to matters of procedure. I asked Judge Gartner if he would consider reconsidering his earlier order declining to transfer the Freidco proceedings to the Southern District of Ohio. Procedural inquiries have long been held appropriate and other testimony before this Committee indicates that Judge Gartner routinely entertained such. Judge Gartner directed me to "file a long, hard, detailed application . . . and I will think about it."

I followed the directions given me by Judge Gartner. I brought an application to his office accompanied by a memorandum of law as required by the local rules of the Southern District of Ohio and departed shortly thereafter. Judge Gartner and I did not discuss the substantative arguments contained in the memorandum and I did not argue the application. Our conference started on administrative matters and moved into procedural matters, one of which dealt with a substantative issue. However, we did not discuss the merits of the substantative issue itself.

Given the benefit of hindsight; having lived through the consideration of this ex parte conference by the Court of Appeals for the Third Circuit and the discussion of it before this Committee, I am certain that I would today stop such an ex parte conference as soon as it became clear that a procedural matter dealing with a substantive issue was to be discussed and considered. But I did not have the benefit of that experience at the time the ex parte conference was being conducted. I did not violate the Canon of Ethics or any ethical duty owed to the legal professional at that ex parte conference, because I believed at that time that it was within the clear authority of Judge Gartner to continue in the manner he did. I believe that the overwhelming majority of practicing lawyers in Cincinnati would have responded to that conference as I did.

It is for this Committee to determine whether this incident bars my confirmation as nominee to be judge for the United States Court of Appeals for the Federal Circuit.

II.

The Internal Revenue Service (IRS) provides that a lien arises if a taxpayer neglects or refuses to pay tax after demand. I.R.C. §6321. In addition, after a tax has been assessed, the amount constitutes a lien. I.R.C. §6322. The normal procedure the IRS follows to institute a lien is as follows: (1) assessment of taxes; (2) notice and demand to the taxpayer for outstanding taxes; and (3) if taxpayer fails to pay within ten days, then imposition of a lien.

The Internal Revenue Code provides that "collection procedures" consist of liens, levies, or related litigation. See generally I.R.C. §§6200-6300. The IRS can ordinarily commence these "collection procedures" only after the IRS has made an assessment of the taxes for which a taxpayer is liable. Accordingly, audit, notice, and tax court actions do not constitute collection procedures because these actions are procedural steps that are taken prior to the assessment of taxes.

In light of these rules, the two tax matters raised in this hearing were not collection procedures. In one matter, the extent of the action taken by the IRS never continued past the audit stage; in the other matter, I settled the tax issue at the administrative level. Neither matter proceeded past the point of a tax assessment, which is the procedural level at which the IRS views collection procedures to commence. Because the IRS didn't institute collection procedures against me for the tax issues in question in these proceedings, my response to Question 20 is correct, and certainly the ABA Committee, with its vast legal resources, should have been aware that this allegation lacks the merit required by EC 8-6.

At the top of page 17 of Mr. Coleman's statement this afternoon, he refers to a letter of November 16, 1982 from the Justice Department to me (a copy of which is attached hereto as Exhibit 14) paraphrasing ABA concerns which states that the ABA is interested in:

> "An IRS investigation or audit of you when you were nominated to be a member of the Federal Communications Commission which allegedly caused you to withdraw your name from nomination." (Emphasis supplied.)

My response to that letter dated November 18, 1982 (a copy of which is attached hereto as Exhibit 15) provided in pertinent part:

> "My 1968 Federal income tax return was audited shortly after I was nominated to be a member of the Federal Communications Commission. I believe the auditor's principal claim, which was disputed, was that I received $166,666.67 as 'constructive income' based upon an upstream merger of corporations in which I owned stock. The claim of constructive income had no basis in tax law. I tried to

> resolve that issue expeditiously but was unable to accomplish that. Accordingly, I retained counsel, filed a protest, and appealed the matter to the appellate level. The matter was subsequently settled at the appellate level by the payment of $3,023.42 additional tax. (Emphasis supplied.)
>
> "I asked that my nomination to the Federal Communications Commission be withdrawn for two reasons. First, while *I believed the tax claim to be specious*, the amount of money involved was substantial and I felt I had to concentrate on that issue. Second, the 1970 mid-term election was in full swing, the audit was leaked to the Cincinnati press, bigger than life, even before completion, and would have become an exaggerated issue during my confirmation hearing to the detriment of the Nixon Administration and myself. (Emphasis supplied.)
>
> "I was represented in this matter by William R. Seaman and Jerry L. Cowan of the Cincinnati firm of Frost & Jacobs, both of whom have talked to the ABA and recommended me for the Federal Bench and have in addition prepared affidavits previously provided to you, Mr. Coleman, and Ms. Born."

The other claims were covered by an amended return, *not contested*, and *not the cause* for my requesting my Federal Communications Commission nomination be withdrawn. The ABA representative reaches a strained conclusion.

The ABA again brings up my 1968 Federal income tax return. It seems clear that I overlooked a $40,000.00 item of income and its resultant deductions. In January 1970, I advised the General Counsel of the Department of the Treasury that I had failed to include some income in my 1968 Federal tax return. He advised me to file an amended return, covering that item, which I did on May 20, 1970. Without digressing to the subject of who discovered the $40,000.00 underpayment first, it is perfectly clear that the IRS conducted a thorough investigation of the entire matter and concluded that the failure to report $40,000.00 was negligence and that a 5% negligence penalty should be attached to the entire deficiency. A copy of the IRS report dated January 13, 1972 is attached hereto as Exhibit 16.

The affidavit of Paul W. Eggers has been reconfirmed. (A copy of that reconfirmation with the original affidavit is attached hereto as Exhibit 17).

It is for this Committee to determine whether the payment of a single negligence penalty in over 30 years of paying Federal income taxes is sufficient to bar my confirmation.

At the top of page 22 and the top of page 37 of Mr. Coleman's statement of this afternoon, Mr. Coleman attempts to impute to himself the knowledge of the Justice Department concerning my tax matters. He has not been "certain of the merit of his complaint." The Justice Department was aware of my amended return and obviously did not consider my response to be either misleading or inaccurate. Perhaps a verification of the Justice Department's position may have been appropriate before the ABA complaint was made to this Committee. Since it seems clear such a verification was not made, I suggest this Committee reflect upon whether the ABA Committee's zeal has exceeded its own standard.

III.

Disciplinary Rule 1-103 included in this statement as Preface B specifically provides: "A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."

Ethical Consideration 8-6 contained herein as Preface A provides in part: "Criticisms motivated by reasons other than a desire to improve the legal system are not justified." To the best of my knowledge, going back to the 1966 complaint of Robert L. Keeler, no lawyer relied upon by the ABA has ever met his compulsory duty to make a report under Disciplinary Rule 1-103, the failure of which is a breach of the Disciplinary Rules and puts into issue his motivation and good faith by advancing them today.

The animous of Paul Welsh has been previously covered.

Robert L. Keeler, referred to by Mr. Coleman as a "distinguished Cincinnati lawyer" (September 29, 1983 hearing transcript at page 63) competes with Mr. Welsh when he talks about ex parte contacts allegedly made in 1966 for which he instituted no action and goes beyond the pale of rumor, gossip or innuendo when he writes this Committee at the request of Mrs. Brooksley E. Born, Chairperson of the ABA Standing Committee on Federal Judiciary; writes Fred F. Fielding, Counsel to the President, at the request of William T. Coleman, Jr. of the ABA Committee; writes Senator Metzenbaum at the request of Lewis H. Van Dusen, Jr. of the ABA Committee, and launches into pure friction without a scintilla of evidence that upon my departure from American Financial Corporation, "Unger barricaded the door to his office and it was some time before that door could be forced open." Such a departure from the fact clearly flies in the face of EC 8-6. Mr. Keeler's motivation and animous can be derived from those three letters (copies which are attached hereto as Exhibit 18). In W.R. Grace & Co. v. Clyde C. Hargadine, the case to which Mr. Keeler refers in the alleged 1966 ex parte contact and alleged deposition difficulties, the Federal District Judge filed a 39-page Memorandum and Certification (a copy of which is attached hereto as Exhibit 19) concerning the conduct of Mr. Keeler, which states that Mr. Keeler has "so obstructed the proper administration of justice herein as to block me in the performance of my judicial duties." The court, in its Certification, concluded there were a "multitude of apparently contemptuous acts which Mr. Keeler committed in connection with this trial . . ." Astoundingly, copies of Mr. Keeler's letter with their bias and reckless disregard of fact addressed to Counsel to the President Fielding and Senator Metzenbaum have been adopted by the ABA and included as Exhibit 5 in their presentation to this Committee. It seems reasonable to compare the Keeler submissions to EC 8-6 to determine whether any of them meet the bare minimum of that consideration and whether their adoption by the ABA, without explanation, meets its own standard.

Jay A. Rosenberg, who represented a creditor in Scioto Park, was severely sanctioned by the court for his conduct in that trial (a copy of the sanction is attached hereto as Exhibit 20). The sanction provided that Mr. Rosenberg's conduct was "contemptible", "detestable", "unprofessional", and "incredible", and an "obstruction of justice" which the court "cannot condone and must censor." Shortly thereafter, the matter was settled favorably from my client's prospective.

Mr. Rosenberg's vindictiveness included a complaint to the U.S. attorney, when I was nominated to become General Counsel of the United States Department of Commerce, of which Mr. Coleman was apprised by Mr. Rosenberg (see Exhibit 21 attached hereto). The U.S. Attorney who conducted the investigation found that the complaints of Mr. Rosenberg were "meritless, without foundation, and could not be substantiated." (A copy of that affidavit, previously supplied to the ABA, is attached hereto as Exhibit 22.) Again, EC 8-6 and the failure of Disciplinary Rule 1-103 should be carefully weighed.

It is important to note that during our earlier conversations, when I inquired of Mr. Coleman and Ms. Born about the failure to utilize Disciplinary Rule 1-103 by any of their then anonymous accusers, I was advised their Committee was not interested in that aspect. Again, when I requested that they examine the motivations of certain of their anonymous sources, I was advised that they had no obligation to do that, but it was my obligation to respond to the charges.

Mr. Coleman, in his statement this afternoon, states at page 1, "The ABA Committee's investigation and evaluations of potential nominees are done at the request of the Justice Department . . . and that the prospective nominee provides information to the ABA at the Justice Department's request." I suggest that this Committee take a hard look at whether the ABA Committee is in fact a de facto advisory committee (5 U.S.C. App. 1) wedging itself between the nominating process of the President and the confirmation process of the United States Senate without providing the party being investigated their statutory rights under the Federal Advisory Committee Act.

There is a fairness issue as well as one of process running through this entire proceeding that should be examined, not only in light of my nomination but on a much more broad basis.

IV.

Mr. Coleman's statement of this afternoon at page 25 emphasizes the testimony of Justice Andrew G.T. Moore of Delaware. That testimony may be found at pages 138 through 170 of the October 5, 1983 hearing transcript. At the October 6 hearing, at page 52, Senator Specter asked whether I had a transcript of what Mr. Kohn said in open court concerning this matter. We have been able to locate the notes of the court reporter, have them transcribed, certified, filed with the court, and copies are now available.

On October 13, 1983, I wrote the Chairman of this Committee pertaining to the imprecision of Justice Moore's memory. A copy of that letter with attachments is attached hereto as Exhibit 23. The entire transcript of the February 4, 1980 hearing before Judge Stapleton is attached hereto as Exhibit 24. The portion pertaining to Justice Moore's testimony commences at page 27 and is self-explanatory. Mr. Kohn did correct, on the record, my affidavit.

Mr. Coleman, in his statement today, again attempts to make much of the fact that Richard C. Van Dusen and George Romney did not consider me a team player some 13 years ago, in 1969 and '70, when I served as General Counsel of the U.S. Department of Housing and Urban Development. It is clear that Secretary Baldrige, for whom I have served as General Counsel of the U.S. Department of Commerce for the last two and one-half years, does not agree with this assessment when he testifies "he has been a great team member." I refer you specifically to Secretary Baldrige's testimony of September 29, 1983 at pages 13 through 15 of the hearing transcript. A copy of his statement is attached hereto as Exhibit 25.

Other prominent attorneys who have offered more contemporaneous statements on my behalf included the Honorable Griffin B. Bell and the Honorable Lloyd N. Cutler (copies of their statements are attached hereto as Exhibits 26 and 27.

In addition, I attach as Exhibit 28, a through f, letters and affidavits sent to the ABA but not included in their exhibits, and as Exhibit 29, a through w, letters and affidavits provided to the Senate Committee on the Judiciary.

* * * * * * * * *

In conclusion, I submit that the ABA has clearly failed to state its burden that I lack integrity and judicial temperament but to the contrary that my record of 30 years at the bar qualifies me to be a Federal Circuit Judge.

that representation with the facts in Freidco.

10. At this point, I move from the realm of well-documented fact, to the realm of suspicion. I know from the Freidco experience that the relationship between Judge Gartner and Mr. Unger involved substantial, documented improprieties. Whether the documented improprieties are the whole story, or simply the tip of an iceberg, I do not know. Persons supporting Mr. Unger have said he has been successful in private practice, and there has been reference to fees awarded to him, approximating a million dollars, approved to him by Judge Gartner. Another supporter of Mr. Unger has stated that Judge Gartner had great confidence in, and admiration for, Mr. Unger. I respectfully suggest that all Committee total the fees Mr. Unger has received by the approval of Judge Gartner, and cause that situation to be investigated quite fully, including analysis of the nature and value of the services to which these fees relate, analysis of Mr. Unger's time sheets to see if the hours claimed are reasonably possible, close analysis of Judge Gartner's financial position for any unexplained improvements in this period, and analysis of whether portions of these large fees may have been directly or indirectly diverted to Unit, Inc. or its principal. The whole thing may boil down to ambitious but "within the outer limits" fee applications, obtained under circumstances of honesty by all concerned, but I suspect otherwise, and would bet otherwise.

Paul Welsh
PAUL P. WELSH

SWORN to and SUBSCRIBED
before me this 5th day of
October, 1983.

Sharon Ciarlo
NOTARY PUBLIC

PREFACE

A. Ethical Consideration, ABA Model Code of Professional Responsibility

EC 8-6 Judges and administrative officials having adjudicatory powers ought to be persons of integrity, competence, and suitable temperament. Generally, lawyers are qualified, by personal observation or investigation, to evaluate the qualifications of persons seeking or being considered for such public offices, and for this reason they have a special responsibility to aid in the selection of only those who are qualified. It is the duty of lawyers to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. Lawyers should protest earnestly against the appointment or election of those who are unsuited for the bench and strive to have elected or appointed thereto only those who are willing to forego pursuits, whether of a business, political, or other nature, that may interfere with the free and fair consideration of questions presented for adjudication. Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified. (Emphasis supplied.)

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Law Offices
Connolly, Bove & Lodge
Farmers Bank Building
Wilmington, Delaware 19899
Cable Address [illegible]
Area Code 302-658-9141
(Telex 83-5477)

P. O. Box 2207

Arthur G. Connolly
Januar D. Bove, Jr.
[illegible]
Thomas R. Lodge
Jacob C. Kellem
[illegible]
[illegible]
Richard E. Cornwell (D.C. Bar)
James M. Mulligan, Jr.
Arthur G. Connolly, Jr.
Rudolf E. Hutz
R. L. Peter Stone
Andrew G. T. Moore, II
Harold Pezzner
John G. Fairchild (Mich. Bar)
Richard M. Beck (D.C. Bar)

Werner H. Hutz
[illegible]
Paul E. Crawford
[illegible]
[illegible]
[illegible]
Stanley C. Macel III
J. R. Julian
James S. Green
N. Richard Powers
Peggy L. Coleman
Henry E. Gallagher, Jr.
Richard E. Foster (Pa. Bar)
Reginald J. Suyat (Pa. Bar)

February 23, 1978 ✓

Sherman E. Unger, Esquire
2724 DuBois Tower
511 Walnut Street
Cincinnati, Ohio 45202

Re: Libel And Malicious Prosecution
Of Sherman E. Unger

Dear Sherman:

You have requested my legal advice with respect to the so-called "Debtor's Amendment To Its Statements And Schedules", signed by Paul P. Welsh, Esquire, on behalf of the firm of Morris, Nichols, Arsht & Tunnell, and by Harry B. Tingle as a purported "successor liquidating trustee" of Freidco. This document was personally served on us in the afternoon of Wednesday, February 22, 1978. I understand that you received a copy today by mail from Mr. Welsh at your offices in Cincinnati. The document has also been filed, as a public record, in the United States District Court for the District of Delaware.

My immediate impression of the document when I first read it, and my continued impression after thinking about it overnight, is that it is a highly unprofessional and irresponsible attempt by Mr. Welsh to achieve an end for his clients which is not justified by the facts in this case or the law. In this respect, I am divorcing consideration of the claims which Hickman and Tingle have made against Unit during the course of this proceeding and the right of their counsel to make fair comment thereon in his role as an advocate. However, the purported Amendment to the Debtor's Statement and Schedules now includes a direct attack upon Unit's counsel, and in my opinion, based on the facts known by me to date after full discovery by all parties on the issue on the appointment of a trustee, the allegations and statements signed under oath by Mr. Tingle, as prepared, drafted and signed by Paul Welsh exceed the bounds of fair comment and privilege. Specifically, I refer to the following, which appears under the heading "Supplement To Schedule B-2 Part Q":

> "The debtor has unliquidated claims against the following persons, of the following type and estimated amount:
>
> "(a) Claims against Unit, Inc. for embezzlement and conversion of the debtor's funds, for wrongful encumbrance of the debtor's property to secure its private obligations, for malicious and negligent mismanagement of debtor's affairs, including without limitation mismanagement of proceedings conducted purportedly on debtor's behalf, for breach of fiduciary obligations, for conversion, and for fraud. The value

of these claims has not been determined, but they are believed to exceed in value all of Unit's claimed interests in debtor and debtor's estate.

> "(b) Claims against Sherman E. Unger, Esquire, for inducing Unit's above described breaches of its obligations to debtor, for participation in all of Unit's said wrongs as a joint tort feaser, for malicious and negligent mismanagement of debtor's affairs, including without limitation mismanagement of proceedings conducted purportedly on debtor's behalf, for breach of fiduciary obligations, for conversion, and for fraud. The value of these claims has not been determined, but they are believed to exceed in value all of Mr. Unger's claimed interests in debtor and debtor's estate." (Emphasis added).

In essence, subparagraph (b) charges you with a knowing participation in a crime, or crimes, apparently for no other reason than your participation in this matter as counsel for Unit and secondarily, because of the fact that you too are a limited partner in Freidco.

If these allegations against you appeared without the benefit of knowing that Hickman, Tingle and Welsh attempted to include in the aborted settlement a requirement that you relinquish your limited partnership interest in Freidco, I would still consider the allegations beyond the protection of any privilege. However, knowing that Welsh negotiated directly with you in an effort to relinquish your participation in Freidco, it may be that these statements are not only unprivileged and libelous, but made for a malicious purpose and to achieve an end which is not warranted by any relief that Freidco or its other partners could rightfully seek against you for any breaches of alleged fiduciary obligations by Unit.

In the short time available to me since this document was served on us late yesterday, I have not had an opportunity to fully research the issues it may present insofar as your right to make a personal claim against Welsh, his law firm, or Harry Tingle. You should be aware that statements made in the course of judicial proceedings, bearing some relation to such proceedings, are ordinarily protected by an absolute privilege. Several cases seem to give lip service to this principle, although certain exceptions are recognized. Tatro v. Esham, Del.Super., 335 A.2d 623 (1975); Read v. Baker, 430 F.Supp. 472 (D.Del. 1977); Petty v. General Accident, Fire & Life Assurance Corp., 365 F.2d 419 (3d Cir. 1966), applying New Jersey law; Prosser, Torts, §109, p.798 (3d Ed. 1964); Restatement 2d, Torts, §586; Annotation, 38 A.L.R.3d 272.

Of course, Mr. Welsh's conduct is always subject to disciplinary action even in the face of an absolute privilege. Thus, if his allegations are false or the product of malice, he may be found guilty of Disciplinary Rule 7-102, which provides in pertinent part:

> "(A) In his representation of a client, a lawyer shall not:
>
> "(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

> "(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law."
>
> * * *
>
> "(5) Knowingly make a false statement of law or fact."
>
> * * *
>
> "(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."

It also would appear that if Mr. Welsh's statements are materially false, he has engaged in the type of misconduct prohibited by Disciplinary Rule 1-102:

> "(A) A lawyer shall not:
>
> "(1) Violate a Disciplinary Rule.
>
> "(2) Circumvent a Disciplinary Rule through actions of another."
>
> * * *
>
> "(4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.
>
> "(5) Engage in conduct that is prejudicial to the administration of justice."

Furthermore, if you believe that you have been libeled by Mr. Welsh, you, as a lawyer, are under an absolute obligation to report the same to the necessary authorities. See Disciplinary Rule 1-103.

If the actions of Messrs. Welsh and Tingle, as well as Morris, Nichols, Arsht & Tunnell are not absolutely previleged, it would appear that you may also have a valid claim for abuse of process. That cause of action was defined in the case of Unit, Inc. v. Kentucky Fried Chicken Corporation, Del.Super., 304 A.2d 320, 331 (1973):

> "In regard to the claim for abuse of process, Prosser states that the essential elements of the tort are: (1) an ulterior purpose; and (2) a wilful act in the use of the process not proper in the regular conduct of the proceedings. In explaining these elements, Prosser notes that some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required. Merely carrying out the process to its authorized conclusion, even though with bad intentions, does not result in liability. Some form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, must be shown. Prosser, Law of Torts, §121 (4th Ed. 1971)."

There may also be a claim for tortious interference with your business relations as a limited partner in Freidco. Again, the opinion in Unit, Inc. v. Kentucky Fried Chicken Corporation, supra is pertinent at p.332. The court stated:

> "The applicable law as to tortious interference with business relations was recently reviewed by Chancellor Duffy in Bowl-Mar Company v. Brunswick Corporation, Del.Ch.,297 A.2d 61 (1972). At 297 A.2d 64, the court cited the Restatement of Torts, §766 (1939) which states:
>
> > '. . .One who, without privilege to do so, induces or otherwise purposely causes a third person not to
> >
> > (a) Perform a contract with another, or
> >
> > (b) Enter into or continue a business relation with another
> >
> > Is liable to the other for the harm caused thereby.'
>
> "The court at 297 A.2d 65 also cited 45 Am.Jur.2d Interference, §50 to the following effect: 'The basic elements which establish a prima facie tortious interference with a business relationship are the exitence of a valid business relation (not necessarily evidenced by an enforceable contract) or expectancy; knowledge of the relationship or expectancy or the part of the interferer; and intentional interference inducing or causing a breach or termination of the relationship or expectancy; and resultant damage to the party whose relationship or expectancy has been disrupted.'"

However, even such tortious interference may be protected by an appropriate privilege. See the Restatement of Torts, §773 (1939) and Unit, Inc. v. Kentucky Fried Chicken, supra, pp.332, 333.

You also asked me about your amenability to service of process in Delaware. Ordinarily, one who comes into this State for purposes of attending court sessions has the privilege of immunity from process. Northumberland Insurance Co. v. Wolfson, Del.Supr., 251 A.2d 194 (1969). While the Northumberland case dealt with a witness, it seems to me that its rationale is equally applicable to a nonresident attorney who is appearing on behalf of a client.

Unless your previous application for counsel fees in the Freidco bankruptcy proceeding is construed as a general appearance, I do not see how you are subject to the jurisdiction of the Bankruptcy Court for the prosecution of any claim of the type set out in the purported Amendment to the Debtor's Schedules. There is one other aspect of this matter which bears some consideration. In the recent case of Shafer v. Heitner, __ U.S. __, 97 S.Ct. 2569 (1977), the United States Supreme Court invalidated the application of the Delaware Sequestration Statute to those nonresidents who do not have "minimun contacts" with Delaware. This would also be true with respect to our Foreign Attachment Statute. Prior to the Heitner decision, a person suing you could have attempted to bring you into this State by seizing your interests in the Freidco partnership. Even if that was attempted in this case by some alleged showing that you had certain minimum contacts with Delaware by virtue of your limited partnership interests in the Farmers Bank Building, it seems to me that a plaintiff would have to face some rather difficult technical questions, relating to those contacts, and secondly, whether the Delaware Sequestration or Foreign Attachment Statutes can be utilized to seize one's interest in a foreign partnership.

While I have tried to outline certain aspects of Delaware law to you, I think the issues are so important that you should consider consulting other counsel, particularly because of the possibility that I may have to be a witness in the event you file suit against Welsh, his firm and Harry Tingle. One of the finest and most successful tort lawyers in this State is Alton Tybout. John Elzufon is now an associate of his firm. He would be at the top of my list if you choose to consult other counsel with respect to this matter. Alton is a widely respected, very tough, and courageous lawyer in the tort field. You could do no better if you had him on your side. You might also consider talking to either Bill Prickett or Rod Ward at Prickett, Ward, Burt & Sanders, the firm that Danny Kristol joined. They also would be at the top of my list for this type of case.

I know you are considering a complaint to the Censor Committee of the Supreme Court of Delaware concerning Paul's conduct. Andy Kirkpatrick is the Chairman of that Committee, and would naturally withdraw from any consideration or participation in such an investigation. If you decide that a complaint should be made, and this is something that must be your personal decision, I would suggest that you write to Henry Herndon, Esquire, of the firm of Morris, James, Hitchens & Williams, P. O. Box 2306, Wilmington, Delaware 19899, one of the members of the Censor Committee. Any Committee member whose firms are associated with participants in the Freidco matter would naturally recuse themselves.

I know that you are very disturbed by what has transpired. Frankly, it is one of the most vicious things that I have ever seen take place during the course of a judicial proceeding, and I am utterly appalled. I can also assure you that Paul Welsh, as well as the conduct that you and I have observed, is in no way indicative of the standards that generally prevail at the Delaware bar.

Very truly yours,

Drew

Andrew G. T. Moore, II

AGTM/js

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

- - - - - - - - - - - - - - - - -x

In the Matter of :

FREIDCO OF WILMINGTON : BK No. 76-49
DELAWARE, LTD., a limited
partnership, :

Debtor. :

- - - - - - - - - - - - - - - - -x

August 25, 1977
11:30 o'clock a.m.
Wilmington, Delaware

BEFORE:

THE HON. WALTER K. STAPLETON, U.S.D.C.J.

APPEARANCES

For Trustee:	PETER J. WALSH, ESQUIRE Murdoch & Walsh
For Farmers Bank:	MAX S. BELL, ESQUIRE Richards, Layton & Finger
For Robert E. Hickman and Harry B. Tingle:	PAUL P. WELSH, ESQUIRE Morris, Nichols, Arsht & Tunnell
For Freidco of Wilmington, Delaware, Ltd.:	ANDREW G. T. MOORE, ESQUIRE JAMES GREEN, ESQUIRE Connolly, Bove & Lodge SHERMAN UNGER, ESQUIRE
For Judge Gartner:	JAMES GARVIN, ESQUIRE JOHN DENNEY, ESQUIRE

or stopped in, and he said, "Judge, we are having trouble in Wilmington."

And I said, "Wilmington?" I said, "What is the matter?"

He said, "Things don't look good for Unit up there. I think they are going to lose their management contract for the Farmers Bank Building."

Well, of course, I reviewed the reports that I got every month from Unit, Inc. and I saw where Freidco was a great contributor to its welfare, $2500 a month approximately, and I presumed that Judge Balick had reviewed Freidco -- as a matter of fact, I understood that Freidco had a co-signer on all of its checks. The problem seems to have been that somebody suspected somebody of some chicanery in this thing, and I was trying to pinpoint where it was, and I wanted to find out where it was, too, because if any hanky-panky was going on in Unit or any of the projects I had, I wanted to find out about it, too.

Incidentally, I read some documents, and you keep referring to my order as an ex parte order, which it was, of course, but believe me, it was not issued just by a person coming in and handing me a piece of paper and saying, "Would you sign this, Judge?" I grilled Mr. Unger for about an hour on the affairs of Freidco in Delaware, trying to figure out and find out just where the problem lay, because, as it was explained to me, I couldn't see the problem.

The only thing we didn't discuss, of course -- and it came up I notice in some other documents -- was, somebody took the Fifth Amendment at some time in the past, and I got wind of that somehow -- I don't know where -- some attorney for one of the parties. And then I called Mr. Unger on the line again and grilled him on that, "Get over here immediately. What is this about the Fifth Amendment?" Well, I dug into that enough to satisfy myself that it wasn't as serious as it purported to be.

The culmination of all this thing was, on the day that we -- as I say, going back to the day that I issued the order which upset everybody, something had to be done. I am administering Unit, Inc. in Cincinnati, Ohio, and they are about to put a trustee in there. I was trying to stabilize the situation to a point where we could have a meeting of the minds somewhere as to just where we are going. The trustee's duty, as I understand it, in a Chapter XII is to somehow present a Plan of Arrangement. You look forward, in a Chapter XII, not to a destruction of the entity but the salvation of it. That is the whole philosophy of Chapter XII.

You even have such provisions as the "cramdown" provision, which is the provision that some Bankruptcy Judges just flatly cram down the secured creditors' throat in order to, as long as he is protected -- I have never gone that far in my thinking yet -- but I do know that Chapter XII is a proceeding in which the object is to confirm a Plan of Arrangement.

Freideo looked like a breeze to me compared to what I had been dealing with in Cincinnati, Ohio. I mean, it is a laydown as far as I am concerned. And that is the reason I issued that order. Mr. Unger came over with the application, and he says, "They are going to step in, Unit is going to be out, and we are going to have confusion. There is this bank building up there" -- which, incidentally, I went through this morning, took a look at it -- and he said, "We are going to have problems. Would you consider taking jurisdiction of Freidco back?"

That is when I told him, "Well, you write me a long, hard, detailed application as to what is going on and let me think about it."

Well, he brought the application over, I read it. He also brought over a suggested entry. I notice here in this Court, from some of the documents that I have read, that apparently the attorneys prepare the order for the Judge, or for the Court. I notice in this particular Court that has happened. I don't do that normally. Very seldom do I have attorneys prepare orders. Even in some routine cases I do it myself. But Mr. Unger came over with a suggested entry, and I looked at it and decided that most of it I didn't like. So I wrote it myself. I just took his and pushed it aside. The only thing I left in his order, as I remember it, was the settings on the filing of briefs for the question of jurisdiction.

I wanted to satisfy myself, hoping to get the cooperation of Mr. Walsh up here, and Mr. Welsh, for that matter, both, as to what would be best to administer this case under the circumstances. I had all the other Unit situations down in my courtroom. Here is this one up here. And you can see from the fact that we have four judges involved, here we are in a proceeding this morning, what it has come to in trying to administer this estate. You have got Freidco creditors, and those I understand are very minor. Unit's creditors are major. And Unit is getting $2500 a month income from the project up here. And as I read the reports, since they took over the management it has been successful. In other words, there has been no diminution of assets in the Unit management of the building.

So it puzzled me as to why it was so necessary at this time to appoint a trustee and step into that operation. But be that as it may, that has happened, and that is not my responsibility, that is for certain.

So I issued the first order and I asked the gentlemen to supply me with briefs as to where it would be better to administer this case at this point, since we have Unit -- and Unit, incidentally, is practically Freidco. They are a 70 per cent partner in that organization. So for all practical purposes they are Freidco. So to the extent that Freidco goes down the drain by superimposing expenses of accounting, expenses of a trustee, traveling expenses -- and I might suggest this, too, your Honor, that we have had in these other proceedings a thorough scrutiny of the books in Texas. I permitted Scioto to go down there and dig into records, and I think they spent either two or three days going through -- I don't know whether they went through all of Unit's records, but I know they went through all of Scioto's -- to look for leakages, to look for anything that would suggest somebody is taking off money. Mr. Morris himself, if he is taking it off I am surprised because he is practically broke; he has lost his home, lost his automobile. And where the things that I read in this case, embezzlement and all that stuff, where it is coming from I want to find out. That was the purpose of my first order, let me find out about it, "Come down here and tell me about it."

pendency of the Freidco proceeding before her?

A I am not so sure. That is the thing I want to find out.

Q Do you have some reservations about that?

A Oh, definitely. That is the reason I did what I did.

Q Now, during the period when Mr. Unger came before you, before your July 14 order, when you were --

A Is that the first order?

Q Yes, the first order; -- when you were grilling him about that and trying to develop the situation, was anything said about the probable duration of the Freidco Wilmington proceeding?

A I don't think anything was said about the probable duration. Again, my concern, Mr. Welsh, was why things were happening the way they were, and with the appointment of a trustee a year and a half later,after the inception of the proceedings, I could see in my own mind that these things were going to go on and on and never going to get to the point of who is going to present the Plan of Arrangement, who is going to vote on it, who is going to modify it, if necessary -- I was concerned as to the fruition of the Freidco situation, not its dissipation.

Q During this session when you were grilling Mr. Unger, was there a court reporter taking down the conversation?

A No. I don't have court reporters in there for conferences and that sort of thing.

Q Was there a recording being made?

A No, no. I presume my secretary was listening in. She usually does.

Q Is there some reason unknown to me why the proceeding should not have been recorded pursuant to

Bankruptcy Rule 511(a)?

A What proceeding?

Q The proceeding in which Mr. Unger was explaining Wilmington and you were learning --

A That is not a proceeding; that is a conference.

Q And all this was done in conferences?

A Oh, yes. You see, Mr. Welsh, a District Judge such as Judge Stapleton has a nice position. He just has to adjudicate things. The poor Bankruptcy Judge, he has to adjudicate, he has to advise, and he has to administer -- he has got a threefold function pinned on him. And that is a different responsibility from what the District Judge has.

Q So that a conference in your view is not a quote proceeding in a bankruptcy case unquote?

A No, absolutely not.

Q Now, what did Mr. Unger tell you about the possible harm to Unit resulting from the appointment would be?

A Well, it isn't so much what he told me, it is what I gathered. As I see the picture here, it is, Mr. Welsh, you appoint a trustee -- now you have got a whole change of administration, as it were. You have got a person running the bank building who is not interested completely in running the bank building because he is a trustee. Unit, Inc. is because if that first mortgage goes into default in any way, shape or form, as I understand the picture, the bank can come in and grab off the pie, in some way, shape or form, and I wanted to be doggoned sure that that wasn't the situation, or I wanted to find out about it, because I was deathly afraid that the minute that that big mortgage, if it does go into default -- and, mind you, you are conducting a Chapter XII; the trustee doesn't have to pay that -- the minute that goes into default, you are in trouble, you have got a problem on your hands. And I could see that -- at least I could visualize it in looking ahead. That was my concern.

Q Judge Gartner, I appreciate your explanation of the concern that you felt. I would like to return to the

5

AFFIDAVIT OF BONITA BUERK

STATE OF OHIO)
)SS.
COUNTY OF HAMILTON)

I, Bonita Buerk, being first duly sworn, state as follows:

1. I am a citizen of the United States and a resident of Florence, Kentucky.

2. For twenty-one years I served as a Deputy Clerk of the Bankruptcy Court and was secretary to the late Judge Leonard Gartner, United States Bankruptcy Judge for the Southern District of Ohio, Western Division.

3. It is my recollection that sometime in July, 1977 after Judge Gartner read Judge Balick's Opinion appointing a trustee for Freidco, Judge Gartner directed me to call Sherman Unger on the phone and "get him over here."

FURTHER AFFIANT SAYETH NAUGHT.

Bonita Buerk
Bonita Buerk

SWORN to and SUBSCRIBED before me, a Notary Public, this 5th day of October, 1983.

Patricia A. Kindel
Notary Public

PATRICIA A. KINDEL, Attorney at Law
NOTARY PUBLIC - STATE OF OHIO
My Commission has no expiration
date. Section 147.03 O.R.C.

IN THE UNITED STATES DISTRICT COURT

6

FOR THE DISTRICT OF DELAWARE

- - - - - - - - - - - - - - - - - -x

In the Matter of :

FREIDCO OF WILMINGTON : BK No. 76-4
DELAWARE, LTD., a limited
partnership, :

Debtor. :

- - - - - - - - - - - - - - - - - -x

August 25, 1977
11:30 o'clock a.m.
Wilmington, Delaware

BEFORE:

THE HON. WALTER K. STAPLETON, U.S.D.C.J.

APPEARANCES

For Trustee:	PETER J. WALSH, ESQUIRE Murdoch & Walsh
For Farmers Bank:	MAX S. BELL, ESQUIRE Richards, Layton & Finger
For Robert E. Hickman and Harry B. Tingle:	PAUL P. WELSH, ESQUIRE Morris, Nichols, Arsht & Tunnell
For Freidco of Wilmington, Delaware, Ltd.:	ANDREW G. T. MOORE, ESQUIRE JAMES GREEN, ESQUIRE Connolly, Bove & Lodge SHERMAN UNGER, ESQUIRE
For Judge Gartner:	JAMES GARVIN, ESQUIRE JOHN DENNEY, ESQUIRE

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And I said, "Wilmington?" I said, "What is the matter?"

He said, "Things don't look good for Unit up there. I think they are going to lose their management contract for the Farmers Bank Building."

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The only thing we didn't discuss, of course -- and it came up I notice in some other documents -- was, somebody took the Fifth Amendment at some time in the past, and I got wind of that somehow -- I don't know where -- some attorney for one of the parties. And then I called Mr. Unger on the line again and grilled him on that, "Get over here immediately. What is this about the Fifth Amendment?" Well, I dug into that enough to satisfy myself that it wasn't as serious as it purported to be.

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You even have such provisions as the "cramdown"

7

TRANSCRIPT OF PROCEEDINGS

UNITED STATES SENATE

Committee on the Judiciary

NOMINATIONS - Unger

- - -

OFFICE COPY
NOT FOR CORRECTING

September 29, 1983
Washington, D. C.

MILLER REPORTING COMPANY, INC.
320 Massachusetts Avenue, N.E.
Washington, D.C. 20002
546-6666

consequences; in other words, there was absolutely on difficulties as a result of that affidavit at all?

Mr. Aug. In my opinion, no.

Senator Hatch. Could you share for us a bit of the custom and practice relating to ex parte contacts in Judge Gartner's courtroom at the time? Now, this was before the 1978 Bankruptcy Reform Bill was passed, that we worked on right here in this committee.

What was the practice? You have heard the criticism of the ABA in this regard. I would like to hear your remarks on that.

Mr. Aug. I would like to speak to that.

Senator Hatch. You have indicated a long-term experience in bankruptcy law practice, teaching, Judicial Conference, writing textbooks, or at least writing the handbooks, and so forth.

Mr. Aug. Judge Gartner was bankruptcy judge, as a referee and as a bankruptcy judge for 21 years, and I knew him all 21 years, and I was in his court all 21 years.

Senator Hatch. First, maybe I should ask you this. Was Judge Gartner an ethical and good judge, or was this improper the way---

Mr. Aug. He was held in the highest regard. We had two bankruptcy judges that came from the old school. They were the referees who succeeded to the position of bankruptcy judge.

One of them is now retired, and Judge Gartner has died. They were held in high esteem. There is just no question about it, integrity, et cetera, et cetera.

Now, Judge Gartner was a person who was kind of bored with the mundane practice of consumer bankruptcies and this type of thing, and enjoyed the challenge of the business bankruptcy and the rehabilitation procedures under the Bankruptcy Act.

He totally involved himself in this. There was some discussion today about who picked up the phone and who called who on the Freidco thing. I do not know how that comes out, but I know from personal experience that if Judge Gartner was concerned about something going on in the administration of one of his business bankruptcies, he would pick up the telephone and call you.

He has called me on occasion. He felt, and I feel, that in the two-hat category that our bankruptcy judges had before 1978, they had to do this. They were administrators, and they were judges. One of the things that I do not think the Bankruptcy Reform Act speaks to today is this void between administration and the judicial part.

Senator Hatch. Well, you are saying it was a common practice before 1978---

Mr. Aug. There is no question about it.

Senator Hatch. --before the Reform Bill, that it was not unusual for Judge Gartner, or the other bankruptcy judge, to call ex parte counsel?

Mr. Aug. No question about it.

Senator Specter. May I ask a question here, Mr. Chairman?

Senator Hatch. Yes.

Senator Specter. With respect to the ex parte practice, was that done on contested matters? When you talk about administrative matters, that is a very---

Mr. Aug. Senator Specter, my experience has been this---

Senator Specter. Excuse me. When you talk about administrative matters, that is a very different thing from contested matters.

Mr. Aug. My experience has been this: that Judge Gartner, if he had a concern, would call you in and express it. If it got to the point of where other counsel should be present, my experience has been that it would stop there and other counsel---

Senator Specter. Excuse me. That is a judgment call, though, as to when other counsel should be present. My question to you is, did the judge do that on contested matters?

Senator Hatch. Did he have ex parte---

Mr. Aug. No, not in my experience, no, sir, and not by reputation. In other words, I am trying to say that while

Judge Gartner would totally involve himself in the administrative process, and wanted to be successful in the challenge of bringing about a viable business that was sick when it came in, he would not go, in my opinion, to the point of impropriety with respect to the one-on-one conversations.

Senator Specter. On contested matters?

Mr. Aug. Yes.

Senator Hatch. Do you know of any contested matters where he did have ex parte conversations?

Mr. Aug. No, and I never heard the complaint before.

Senator Hatch. In this particular case, the complaint of the Bar Association is that Mr. Unger not only had an ex parte conversation with the judge, but that he presented a memorandum of law plus an order for the judge, a requested order.

What do you know about that?

Mr. Aug. Senator, I do not know anything about that.

Senator Hatch. Does that sound like Judge Gartner would have allowed that to occur?

Mr. Aug. Judge Gartner was an honorable judge. In my opinion, he would not at any time invade the province, or do anything prejudicial to opposing counsel or to opposing positions.

Senator Hatch. Do you have any further questions, Senator Specter?

8

AFFIDAVIT OF BONITA BUERK

STATE OF OHIO)
) SS.
COUNTY OF HAMILTON)

Bonita Buerk, being first duly sworn, states as follows:

1. I am a citizen of the United States and a resident of Florence, Kentucky.

2. For 21 years, I served as a Deputy Clerk of the Bankruptcy Court and as secretary to the late Judge Leonard Gartner, United States Bankruptcy Judge for the Southern District of Ohio.

3. During my service with Judge Gartner, I became familiar with the way Judge Gartner conducted his court and handled matters that were pending before him.

4. It was Judge Gartner's practice to summon an attorney or trustee to his chambers in order to discuss with that individual any situation or problem which the Judge felt needed explanation or clarification.

5. On occasion, Judge Gartner would telephone an attorney and hold such discussions by telephone.

6. The subject matter of these conferences varied but were normally precipitated by the filing of a report of a trustee, debtor-in-possession or attorney and dealt with some aspect of the administration of the debtor's or bankrupt's

estate including, on occasion, a procedural problem arising from a contested or adversary proceeding.

7. It is my recollection that Judge Gartner would routinely meet with attorneys and trustees on any matters he felt would aid the efficient administration of bankruptcy estates and many attorneys and trustees practicing before Judge Gartner engaged in such conferences over the years.

FURTHER AFFIANT SAYETH NAUGHT.

Bonita Buerk

Bonita Buerk

SWORN to and SUBSCRIBED before me this 15th day of January, 1983.

Notary Public

My Commission Expires 12-11-84

Frankfurter tried to explain this in his opinion in the *National Mutual* case, 337 U.S. at 652 n. 3. He spoke to the matter again in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 471–484 (1957).[63] Yet the explanations he offers in those two opinions do not seem to me to be wholly consistent.

Thus, though I have thought carefully about this since I first received your letter, and had hoped that I could provide a more helpful conclusion for you, I regret to have to say that the only one of your questions that I can answer is the first. Certainly the courts contemplated by the two bills before you would be "legislative courts," created by Congress by virtue of its Article I power to make bankruptcy laws. In the present state of knowledge, I fear that to say anything more than this would be sheer guesswork. I do not know how many angels can stand on the head of a pin until the Supreme Court tells me. I do not mean by use of that phrase to suggest that the questions you pose are not important ones or that they are not very proper questions for you to raise, but only that the Supreme Court has made such a mess of this phase of the law that medieval theologians would be as reliable a source of guidance on it as modern professors.

I have read the portion of Mr. Plumb's article to which you referred in his letter. I agree with the doubts he raises and would add a further doubt whether Article I judges can be given power to punish for contempt. But both he and I are shooting in the dark, and the Supreme Court may tell us that we are quite wrong.

I wish I could be more helpful and do not envy you and the Judiciary Committee the difficult task these bills raise for you.

Sincerely,

CHARLES ALAN WRIGHT,
McCormick Professor of Law.

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[62] 69 S.Ct. 1173, 93 L.Ed. 1556.

[63] 77 S.Ct. 912, 1 L.Ed.2d 972.

[page 88]

CHAPTER 2. THE ADMINISTRATION OF BANKRUPTCY CASES

INTRODUCTION

The second major change proposed by the bill is the creation of a Government officer to supervise the conduct of bankruptcy cases, and to serve as trustee in bankruptcy cases when private trustees are unwilling to serve. Many of the functions assigned to the new official, called the United States trustee, are currently performed by bankruptcy judges. Under the proposed system, the bankruptcy judges will be handling only judicial matters in bankruptcy cases. The proposed United States trustees will be the repository of many of the administrative functions now performed by bankruptcy judges, and will serve as bankruptcy watch-dogs to prevent fraud, dishonesty, and overreaching in the bankruptcy arena.

I. THE CURRENT ADMINISTRATIVE SYSTEM AND ITS PROBLEMS

Bankruptcy judges administer the present bankruptcy system, and are responsible for the administration of individual bankruptcy cases. Their administrative, supervisory, and clerical functions in these matters are in addition to their judicial duties in bankruptcy cases.[1] The situation is in marked contrast to most litigation, in which the parties themselves manage the progress of the case. The judge does not become involved in the case, and if a party fails to take action, the judge does not intercede on his behalf. Instead, the party is foreclosed.

The practice in bankruptcy is different for several reasons. First, there is a public interest in the proper administration of bankruptcy cases. Bankruptcy is an area where there exists a significant potential for fraud, for self-dealing, and for diversion of funds.[2] In contrast to general civil litigation, where cases affect only two or a few parties at most, bankruptcy cases may affect hundreds of scattered and ill-represented creditors.[3] In general civil litigation, a default by one party is relatively insignificant, and though judges do attempt to protect parties' rights, they need not be active participants in the case for the protection of the public interest in seeing disputes fairly resolved. In bankruptcy cases, however, active supervision is essential. Bankruptcy affects too many people to allow it to proceed untended by an impartial supervisor.

The bankruptcy judges have stepped in to perform the supervisory role because of the dearth of creditor participation. The Bankruptcy

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[1] *See Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 1st & 2d Sess., ser. 27, pt. 1, at 99-101, 121, 259-66 (1975-76) [hereinafter cited as *Hearings*].

[2] *See* COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, REPORT, H.R. Doc. No. 93-137, 93d Cong., 1st Sess., pt. I, at 6, 93, 103-17 (1973) [hereinafter cited as COMMISSION REPORT].

[3] *See Hearings*, pt. 3, at 1699-1702, 1723-28 (consumers creditors).

[page 89]

Act was designed in 1898 to give creditors control over the bankrupt's assets, which in equity belong to them. The bankruptcy trustee, whose trust is for the benefit of creditors, was to be elected by creditors.[4] Creditors were permitted to elect a committee to represent them in additional matters, such as the conduct of the case, and supervision of the work of the trustee.[5] However, creditor control of bankruptcy cases has become a myth in all but the largest cases.[6] The only supervision available is by the bankruptcy judges themselves.

The Bankruptcy Act provides for the default of creditor control by vesting the creditors' normal functions in the bankruptcy judge when the creditors do not exercise them. The bankruptcy judge is required to appoint a trustee in liquidation cases when creditors do not elect one.[7] The bankruptcy judge supervises the trustee in the performance of his duties, often suggesting causes of action that the trustee might pursue to recover assets for the estate. The bankruptcy judge reviews nearly all transactions that trustees enter into, and rules, usually ex parte, on their propriety. The bankruptcy judge frequently entertains requests for instructions from trustees for even the most routine matters. In addition to his supervisory role with respect to the trustee, the bankruptcy judge must preside at first meetings of creditors,[8] and must supervise examinations of the debtor, which are little more than depositions taken by the trustee or creditors to obtain information with which to begin an investigation.

It is enough of a reason for change that these functions and duties of the bankruptcy judge constitute no part of his judicial responsibilities, and divert him from the important judicial and legal work that must be done in bankruptcy cases. However, if that were the system's only vice, adjustments less than those proposed in the bill might suffice. Deeper problems arise because of the inconsistency between the judicial and administrative roles of the bankruptcy judges. The inconsistency places him in an untenable position of conflict, and seriously compromises his impartiality as an arbiter of bankruptcy disputes.[9]

A. THE COMBINATION OF ADMINISTRATIVE AND JUDICIAL ROLES

The bankruptcy judge is often called upon to resolve disputes between the estate and adverse third parties. The estate is represented by the trustee, usually an appointee of the bankruptcy judge, serving in many cases that are before that judge, and continually being reappointed to new cases as they come in. There usually develops a close working relationship between the judge and "his" trustee, due to the necessity for frequent ex parte contacts between the judge and the trustee in the administration of the case. It is not uncommon to see a trustee enter a courtroom, for a hearing on a matter, from the judge's chambers, followed closely by the judge himself. As often as not, the trustee was working with the judge on a different matter than the

[page 90]

one up for hearing. Nevertheless, the combined force of all of these factors seriously compromises the appearance of the bankruptcy judge as an impartial arbiter. They have worked to generate deep suspicion on the part of attorneys who practice in the bankruptcy court as to the fairness of the decisions of the bankruptcy court.[10]

The bankruptcy judge must preside at the first meeting of creditors, at which an examination of the debtor usually takes place.[11] The judge listens to the examination, and rules on the permissibility of any challenged questions posed to the debtor. The scope of the examination is broad. It may cover any of "the acts, conduct, or property of a bankrupt."[12] It is similar to a deposition. Its purpose is to permit the trustee to gather enough information to determine whether there are assets to pursue, transfers that are avoidable, or causes of action on which to bring suit. Much of the testimony elicited would be inadmissible in a trial,[13] but is necessary to assist the trustee in the performance of his duties. The bankruptcy judge, which presiding at the meeting, listens to all of this evidence. If disputes arise later in the course of administration of the case, the bankruptcy judge must rule. If the trustee initiates a cause of action, the bankruptcy judge must hear the trial, without a jury. It is not uncommon for a bankruptcy judge to be unable to recall, when called up to resolve a dispute or find facts after a trial, whether the information on which he is basing a decision was heard at the first meeting of creditors, during the judge's extensive ex parte contacts with the trustee and with counsel during the administration of the case, or during the actual trial on the issue presented for decision.[14] It is a fundamentally unfair system that channels inadmissible evidence to the arbiter that must decide disputed issues.

The judge obtains information and impressions from other sources as well. A bankruptcy judge may be required to grant a debtor in possession in a reorganization case authority to enter into a contract subject to certain terms and conditions. The judge may actually participate, through the debtor in possession, in negotiating the con-

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[4] Bankruptcy Act sec. 44a, 11 U.S.C. 72(a) (1970).
[5] Bankruptcy Act § 44b, 11 U.S.C. 72(b) (1970).
[6] COMMISSION REPORT, pt. I, at 103-17.
[7] Bankruptcy Act § 44a, 11 U.S.C. 72(a) (1970).
[8] Bankruptcy Act §§ [illegible], 55b, 11 U.S.C. 66(2), 91(b) (1970); Rules of Bankruptcy Procedure 204(a)(2).
[9] *Hearings*, pt. 1, at 591-93; COMMISSION REPORT, pt. I, at 93-94.

tract. He may work with the debtor in possession and a union to avert a strike that would ruin the business. He may advise the debtor in possession or the trustee in the management of the business, and issue frequent instructions for its conduct. Later in the case, that same judge may be faced with the responsibility for resolving a dispute that arises over the terms of the contract that he participated in negotiating or over the nature of the union's obligation to the debtor. An individual that is in effect a "party" to a contract simply cannot render a fair or impartial decision concerning its interpretation.

In particular cases, a judge may, after reviewing the schedules of assets and liabilities that the debtor has filed, and various other information in the case, suggest to a dilatory trustee that he pursue a cause of action, for example to recover a preference or avoid a lien,

[page 91]

or suggest that he initiate a proceeding to recover an asset of the estate held by a third party. If the trustee brings the action in the bankruptcy court, the bankruptcy judge that suggested it will be sitting in judgment on the validity of the trustee's claim. Such a position is untenable for any adjudicator in our judicial system.

These factors add an additional dimension to the position of the bankruptcy judge. As the administrator of bankruptcy cases, and the individual responsible for the supervision of the trustee or debtor in possession, it is an easy matter for a bankruptcy judge to feel personally responsible for the success or failure of a case. Bankruptcy judges frequently view a case as "my case."[15] The institutional bias thus generated magnifies the likelihood of unfair decisions in the bankruptcy court, and has caused at least one occasional bankruptcy practitioner to suggest that "the bankruptcy court is the only court I appear in in which the judge is an interested party."

These problems are particularly acute in business rehabilitation cases. In chapter X corporate reorganization cases, the judge must appoint the trustee,[16] and then work with the trustee in the conduct of the business. The appearance of unfairness generated when the judge's appointee appears before the judge for a hearing is magnified because the judge must work so closely with the trustee in the management of the business undergoing reorganization. Though there is no trustee in a chapter XI or chapter XII arrangement case, the judge works closely with the debtor in possession in the management of the business. It is in these cases in which the judge's personal responsibility for the success or failure of a case is intense, with the consequent appearance of bias in the judge's consideration of disputes that arise in the case.

None of these problems are the creation of the bankruptcy judges themselves. As a whole, they are fair-minded individuals who do the best they can to avoid the conflicts and institutional bias that exists in the bankruptcy system. Nevertheless, the structure of the system, written into the present Bankruptcy Act as law, necessitates the awkward position in which the bankruptcy judges find themselves, and

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[10] *Id.*

[11] Bankruptcy Act §§ 38(2), 55b, 11 U.S.C. 66(2), 91(b) (1970).

[12] Bankruptcy Act § 21a, 11 U.S.C. 44(a) (1970): Rules of Bankruptcy Procedure 205(d).

[13] *Hearings*, pt. 1, at 566-67.

[14] *Id.*

brings disrepute on the whole system. The law must be changed to afford bankruptcy litigants the fair and impartial justice to which all other litigants in the federal courts are entitled.

B. CREDITOR CONTROL

Other problems, unrelated to the conflicting roles of the bankruptcy judges, exist in the current administrative structure of the Bankruptcy Act. They may be grouped under the general heading of creditor control. When the Bankruptcy Act was adopted 80 years ago, the underlying premise was that the money of the estate was essentially a trust for the benefit of the bankrupt's creditors. Consequently, the creditors themselves should be entitled to supervise the collection and liquidation of the estate. They would do so through their elected representative, the trustee in bankruptcy. They would supervise the work of the trustee through an elected creditors' committee, who would serve without compensation, simply to protect their own interests and the interests of those they represented.[17]

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The present Bankruptcy Act thus relies exclusively on a system of private trustees,[18] supervised by the bankruptcy judges. The Act contemplates election of a trustee in each case by the general unsecured creditors. If, however, creditors do not elect a trustee, the judge may appoint a trustee to serve in the case.

The notion of creditor control, while still theoretically sound, has failed in practical terms. Creditor control in bankruptcy cases is a myth.[19] Creditors take little interest in pursuing a bankrupt debtor. They are unwilling to throw good money after bad. As a result, creditor participation in bankruptcy cases is very low. More often than not, the bankruptcy trustee is appointed by the judge, which generates some of the institutional bias problems noted above. Such a practice, while damaging to the system's appearance of integrity, is innocuous from the standpoint of creditor control. It does no harm to the debtor or to creditors.

However, if there are assets available in a case, the vacuum created by the lack of creditor interest in the case is not in fact filled by the bankruptcy judge, and the result is not innocuous. In practice, creditor control has become attorney control, and the bankruptcy system operates more for the benefit of attorneys than for the benefit of creditors.[20] The practices that have grown out of this shift of control often work to the detriment of both debtors and creditors. They benefit only those administering bankruptcy cases.

The means by which those operating the system turn it to their own advantage are served. Frequently, an attorney that has represented a creditor in past cases will notify him of the bankruptcy of one of the creditor's current debtors. The attorney then obtains a proxy from the creditor to vote the creditor's interest in the case. An attorney may obtain numerous proxies in a particular case in this manner. When the trustee is to be elected, the attorney votes all of his proxies for a colleague. The colleague thus elected then hires the attorney to serve as counsel to the trustee in the case, assuring a fee for his services. The

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[16] *Hearings*, pt. 1, at 593.
[17] Bankruptcy Act § 156, 11 U.S.C. 556 (1970); Rules of Bankruptcy Procedure 10-202(a).

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

- - - - - - - - - - - - - - - - -x
In the Matter of :
FREIDCO OF WILMINGTON : BK No. 76-49
DELAWARE, LTD., a limited
partnership, :
Debtor. :
- - - - - - - - - - - - - - - - -x

August 25, 1977
11:30 o'clock a.m.
Wilmington, Delaware

BEFORE:

THE HON. WALTER K. STAPLETON, U.S.D.C.J.

APPEARANCES

For Trustee:	PETER J. WALSH, ESQUIRE Murdoch & Walsh
For Farmers Bank:	MAX S. BELL, ESQUIRE Richards, Layton & Finger
For Robert E. Hickman and Harry B. Tingle:	PAUL P. WELSH, ESQUIRE Morris, Nichols, Arsht & Tunnell
For Freidco of Wilmington, Delaware, Ltd.:	ANDREW G. T. MOORE, ESQUIRE JAMES GREEN, ESQUIRE Connolly, Bove & Lodge SHERMAN UNGER, ESQUIRE
For Judge Gartner:	JAMES GARVIN, ESQUIRE JOHN [illegible], ESQUIRE

authorize those funds that were absolutely necessary to carry that project -- nothing further, no attorneys' fees, no costs, telephone calls, no nothing. And that is the way we handled it for about five weeks.

Mr. Morris came in a week or so after this Freidco as I choose to call it fiasco, and I said, "How are things in Wilmington?"

And he says, "Not so good."

I says, "What do you mean?"

He says, "Well, the trustee is moving in and we don't know where we stand. We just don't know how to manage this. We don't know where we are going at this particular point."

Well, as I recall, that was the week that Mr. Unger went on vacation, and I thought about the situation and said, "There has to be some way to preserve and protect and do something with that Freidco problem until we can find out where the bug is, where the disagreement is, where the lack of information is, why there isn't a Plan being acted upon." As far as I was concerned, it was very simple, but when you see simple things and they are not being acted on, you wonder, there has got to be a bug somewhere in it.

So on my own I issued that sua sponte order in which -- I think that is the one in which I requested Mr. Walsh -- or I didn't request him, I think I ordered him to come up to Cincinnati and appear on a day certain to show me -- I wrote in the Order, I tried to explain my thinking on the subject. I don't know whether your Honor has ever read that or not, but I tried to explain my reasoning. I wantedhim to tell me, you know, Where are you going -- quo vadis -- what direction are you taking in this thing?

I didn't care about the trustee. That is fine. If they want to have a trustee, great. It costs money, and it wrecks the Debtor a lot of times, and I understood there was good equity in that building, and here is Mr. Hickman and Mr. Tingle, who are partners, they are going to recover assets from that thing to the extent that it is not demolished -- I just couldn't figure it. So I wanted him to come and ask him, What are you going to do now? Is it your plan to do this or that?

Well, of course, instead I got your Honor's stay order or something -- I forget what it was -- but in any event it was this suit, I suppose, where I was ordered to appear. I think I received it on a Wednesday, the 3rd of August, as I remember, and it ordered me to appear on Friday. And I think I called your Honor and said that my co-bankruptcy Judge was on vacation and I couldn't appear.

RECEIVED
JUL 27 1977

11

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN THE MATTER OF	I	
UNIT, INC.	I	Bankruptcy No. B-1-75-1989
Debtor.	I	

ORDER REQUIRING PETER J. WALSH, ESQ. TO APPEAR AND SHOW CAUSE; SUGGESTING ROBERT E. HICKMAN AND HARRY B. TINGLE DO LIKEWISE AND COMMENTS.

At Cincinnati, in said District, on July 26, 1977:

It is unfortunate, albeit unique, that two courts of para-jurisdiction should find themselves in what appears to be a collision course for justice.

And yet this may not be so, nor is it necessarily so.

On July 14, 1977 this Court entered an order vacating a previous order of January 7, 1976 in which it refused to accept jurisdiction for the administration of the Chapter XII proceeding of Freidco of Wilmington Delaware, Ltd. (hereafter Freidco), all as set forth in said orders.

That July 14, 1977 order was based upon an application by Unit, In Debtor-inPossession herein, as set forth therein, and with full knowledge of the decision and order of Bankruptcy Judge Balick in Wilmington, Delawar appointing a trustee; in fact, because of that appointment.

It is to be emphasized at this point that the Cincinnati Court has no quarrel with, nor criticism of, the appointment of a trustee in Freidco at Wilmington. Such a matter is strictly the concern of that court.

One casual observation -- Bankruptcy Judge Balick, in her opinion of June 30, 1977 observes at the bottom of page three:

> "Extensive discovery, testimony and hundreds of exhibits presented during five days of hearing have shown that there are numerous charges and counter-charges between and among Unit, Freidco-Wilmington, Farmers and Hickman......"

If the experience of this Court (which is administering several cases in the Unit conglomerate) is any barometer of the experience of Bankruptcy Judge Balick, most of that five day discovery process was bickering among attorneys.

One further observation -- Bankruptcy Judge Balick in her ruling on July 22, 1977 recognizes the power of bankruptcy judges to reconsider orders. She states:

> "....and it is true that bankruptcy judges, as other

> judges, have the inherent power to reconsider orders." Extract of proceedings of July 22, 1977 -- Oral argument and rulings of the Court. pg. A-3.

Since this Court's order of July 14, 1977, additional information, knowledge, has been made available to it, i.e. the order of Bankruptcy Judge Balick of July 22, 1977; her partial findings as of that date; the Temporary Restraining Order of District Judge Walter K. Stapleton of July 20, 1977 (vacated); the Order of District Judge Walter K. Stapleton of July 22, 1977; the letter of Peter J. Walsh dated July 19, 1977 to Bell, Moore, Unger and Welsh, Esqs. (copy to Bankruptcy Judge Balick). It is to this last item that this Court should like to turn its attention now. On page 2 of that letter Mr. Walsh observes:

> "As I read Judge Gartner's Order, it does not actually stay in toto my activities as a trustee, although the particualr functions which it does not purport to preclude are not easy to discern."....

This Court certainly understands his confusion and will attempt to clarify it.

Freidco, Ltd. a limited partnership is in a Chapter XII proceeding in the Bankruptcy Court at Wilmington, Delaware and it is the responsibility of that court to administer it -- hopefully to the successful confirmation of a plan of arrangement.

Unit, Inc., a corporation, is in a Chapter XI proceeding in the Bankruptcy Court at Cincinnati, Ohio and it is the responsibility of this Court to administer it -- hopefully to the successful confirmation of a plan of arrangement (overdue in this court at this time by a few days).

Unit, Inc. is a general partner in Freidco as well as in other limited partnerships some of which are in Chapter XII proceedings in this Court and appear to be moving ahead to better days. The combined success of these sundry operations is the ultimate success of Unit, Inc.

Unit, Inc. besides its role as general partner above noted, is managing a building in Wilmington, Delaware known as the Farmers Bank Building and apparently successfully so, at least this Court has received no evidence to the contrary, and as Unit's reports to this Court would reflect (See Twenty-First Report of Debtor In Possession - filed July 20, 1977 - Exhibit A attached).

Article III, Section 311 of the Bankruptcy Act (11 U.S.C 711) provides as follows:

> "Where not inconsistent with the provisions of

> this chapter, the court in which the petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and his property, wherever located."

See also the Rules Comment and the tie-in with Rule 11-44 of the Rules of Bankruptcy Procedure, Section (a) of which grants "...a stay of...other proceedings against the debtor,...".

The management arrangement of Unit, Inc for the Farmers Bank Building in Wilmington, Delaware is property of the debtor until this Court can be shown to the contrary. It is a valuable asset to its estate and anyone interfering with that operation is answerable to this Court.

See definition of "Property", Blacks Law Dictionary, 1968 Ed. (Revised 4th).

Peter J. Walsh is ordered to appear in this Court on Thursday, August 11, 1977 at 10:00 A.M. in Room 721, Courtroom No. 2, United States Post Office and Court House 5th & Walnut Streets, Cincinnati, Ohio, to show cause in line with the foregoing comments.

This Court likewise suggests that Messers Robert E. Hickman and Harry B. Tingle appear at the same time to show what unlawful acts were alleged to have been committed by Messers Aug. Unger and Kohn to justify their appearing before District Judge Walter K. Stapleton to obtain a Restraining Order. These gentlemen are, in their capacity as attorneys in these proceedings, officers of this Court. See order of District Judge Walter K. Stapleton of July 20, 1977 (vacated). This Court is intently interested in the conduct of its officers.

IT IS SO ORDERED.

Bankruptcy Judge

ENTERED

JUL 26 1977

FILED

JUL [illegible] 1977

LEONARD C. [illegible]
RAYMOND J. PELLMAN
BANKRUPTCY JUDGES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN THE MATTER OF	:	No. B 1-75-1989 In Proceedings for an Arrangement
UNIT, INC.,	:	
Debtor	:	TWENTY-FIRST REPORT OF DEBTOR IN POSSESSION

DOCKETED

Unit, Inc., debtor in possession in the within proceedings, hereby submits its Twenty-First Report of Debtor in Possession, the same being attached hereto and marked Exhibit A.

UNIT, INC.

By
B. W. Morris,
General Partner

[illegible]
INCOME AND DISBURSEMENTS
JUNE 1977

DATE	1977	CK#	DR.	CR.	Dallas International Bank
JUNE					
5/31	Beginning Balance		650.14		
6/1	U. S. Postmaster	1595		50.00	Postage
6/6	Deposit		2,500.00		Management Fee
6/7	Deposit		74.07		Empl. Ins. Reimbursement(
6/7	Deposit		4,000.00		Management Fee (Main Towe
6/6	James Mayer	1596		200.00	Fee/Mgmt. (Hillcrest #II)
6/6	B. W. Morris	1597		100.00	Advance
6/7	ADS Postalia	1598		58.28	Postage
6/7	American Express	1599		1,199.35	Travel
6/7	Aetna Life & Casualty	1600		724.03	Employers Ins.
6/7	Bankers Club	1601		124.35	Travel
6/7	Bell Telephone	1602		827.00	Telephone
6/7	Braniff International	1603		970.12	Travel
6/7	Cincinnati Bell	1604		307.50	Telephone
6/7	City Club	1605		64.80	Travel
6/7	Columbia Olds.	1606		198.55	Auto Expense
6/7	Diners Club	1607		101.82	Travel
6/7	Floyd West & Co.	1608		349.90	Insurance
6/7	Olsten Temporary	1609		171.00	Office Expense
6/7	Shell Oil Co.	1610		41.88	Travel
6/7	Xerox Corp.	1611		220.50	Office Expense
6/7	Xerox Corp.	1612		219.45	Office Expense
6/7	Columbia Olds.	1613		96.46	Auto Expense
6/9	Deposit		2,198.28		Management Fee (Cliffs)
6/9	Deposit		1,801.09		Management Fee (Patchen)
6/15	Payroll	1614-1618		3,050.77	Payroll
6/14	Dallas Internatioanl	Bk.1619		1,695.23	Federal Deposit
6/13	Texas State Treas.	1620		125.00	Texas Unempl. Tax
6/14	Deposit		1,831.74		Management Fee(Hillcrest
6/20	Deposit		186.55		Empl. Ins. Reimb.(Cliffs Patche

Exhibit A

Income & Disbursements
JUNE 1977

DATE	1977	CK#	DR.	CR.	Dallas International Bank
6/20	U.S. Postmaster	1621		50.00	Postage
6/22	Hillcrest Square	1622		3,143.40	Hillcrest Mgmt. Fee
6/22	Deposit		3,143.40		Hillcrest Mgmt. Fee Reimb.
6/24	Deposit		105.09		Empl. Ins. Reimb.
6/30	Payroll	1623-1627		3,050.77	Payroll
6/27	Deposit		2,000.00		Management Fee (Cliffs)
6/29	Aetna Life & Cas.	1628		160.17	Empl. Ins.
6/29	Deposit		2,500.00		Management Fee (Freidco)
6/29	Deposit		82.20		Dividend Freidco of LV
/30	James Mayer	1629		200.00	Fee/Mgmt. Hillcrest #II
6/29	Xerox, Corp.	1630		661.50	Office Expense
	Void	1631			Void
6/29	Shell Oil Co.	1632		41.15	Travel
6/29	Exxon Co.	1633		53.56	Travel
6/29	Cincinnati Bell	1634		451.66	Telephone
6/29	Cincinnati Bell	1635		207.99	Telephone
6/29	Bell Telephone	1636		692.29	Telephone
6/29	Armstrong Coffee	1637		68.14	Office Expense
6/29	Solar Vision Inc.	1638		20.00	Office Expense
6/30	Payroll	1639		235.37	Payroll
			$ 21,072.56	$ 19,931.99	
6/30/77	ENDING BALANCE		$ 1,140.57		

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CANON 3(A),
ABA Model Code of Judicial Conduct

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond. (Emphasis added.)

13

DR 7-110 CONTACT WITH OFFICIALS
ABA Model Code of Professional Responsibility

DR 7-110 Contact with Officials.

(B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:

(1) In the course of official proceedings in the cause.

(2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.

(3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.

(4) As otherwise authorized by law, or by Section A(4) under Canon 3 of the Code of Judicial Conduct. (Emphasis added.)

U.S. Department of Justice
Office of Legal Policy

14

Assistant Attorney General
Washington, D.C. 20530

November 16, 1982

Sherman E. Unger
General Counsel
Department of Commerce
Washington, D.C. 20230

Dear Sherm:

As you know, the ABA and the FBI have conducted extensive background investigations in connection with your prospective nomination to become a member of the Court of Appeals for the Federal Circuit. In the course of those investigations certain allegations have been made about which we would very much appreciate any information you can give us. This will assist us in bringing this matter to a prompt conclusion as soon as we responsibly can.

The matters about which we have received allegations are set forth below:

(1) The circumstances surrounding your discharge as an officer of American Financial Corporation.

(2) Charges of improper behavior in connection with the bankruptcy proceedings of Unit, Inc. Essentially, these charges relate to an alleged back-dating of a document and an alleged false statement by you regarding your interest in Unit, Inc.

(3) An IRS investigation or audit of you when you were nominated to be a member of the Federal Communications Commission which allegedly caused you to withdraw your name from nomination.

(4) Alleged *ex parte* contacts by you with Judge Leonard C. Gartner in bankruptcy proceedings described in 13-B, 13-D and 13-F of your responses to the personal data questionnaire.

(5) Allegations that you were threatened with contempt or held in contempt in the Wilmington bankruptcy proceeding described in paragraph 13-H of your responses to the personal data questionnaire.

(6) Allegations that you attempted to get yourself substituted as counsel in a shareholder derivative proceeding while counsel for the shareholder was on vacation. This case is described in 13-A or 13-I of your responses to the personal data questionnaire.

(7) Your discharge by President Nixon from your job as General Counsel at HUD.

(8) Charges that you took fees from debtors in bankruptcy proceedings without prior court approval and that you requested approval of excessive fees.

(9) Allegations that you orally agreed to extension of time in court proceedings and then reneged on your agreement.

(10) Charges that you continued to talk directly with an opposing party after the opposing party was represented by counsel who had requested that you deal only with counsel.

(11) Allegations that you represented to the court that it was unduly burdensome for your client to go to Wilmington, Delaware, when in fact your client was in Wilmington, Delaware, at the time.

Sincerely,

Jon

Jonathan C. Rose

GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

15

November 18, 1982

Honorable Jonathan C. Rose
Assistant Attorney General
for Legal Policy
U.S. Department of Justice
Washington, D.C. 20530

Dear Jon,

This will acknowledge receipt of your hand delivered letter dated November 16, 1982 concerning my prospective nomination to become a member of the Court of Appeals for the Federal Circuit. I want to be as open and responsive in this matter as possible. However, certain of the allegations set out in the letter are vague, imprecise, and do not provide even a hint of when they may have occurred or the case to which they refer. I believe that more information may be required to be fully responsive.

A copy of your letter is attached as Exhibit A. I will respond to the points as numbered in that letter.

(1) This item refers, I presume, to the Kreider and Berghaussen affidavits which were prepared in 1978, some six years after two individual events purportedly occurred in 1972. As you know, and at your request, I executed an affidavit specifically denying the facts stated in the Kreider and Berghaussen affidavits. A copy of that affidavit is enclosed and marked as Exhibit B. The true facts concerning my departure from American Financial are contained in my affidavit dated July 23, 1978 which is attached hereto and marked as Exhibit C (a copy of which was previously provided to Mr. Coleman in my letter of September 17, 1982). I have continuously disputed the factual content in the Kreider and Berghaussen affidavits as set out in Exhibit D, which is a footnote contained in Plaintiff's Reply Memorandum in Opposition to Defendants' Motion to Dismiss in Piedmont Paper Products v. AFC. In addition, the Kreider and Berghaussen affidavits were prepared for a very questionable purpose, that being to coerce me into withdrawing an application to be counsel in a matter being litigated.

It certainly seems reasonable that if the events described by Kreider and Berghaussen had in fact occurred, there would have been some record made contemporaneously with the alleged occurrences. None has ever been produced. Evidence of an entirely different atmosphere is contained in the letters from Carl Lindner to me in 1972, which were written contemporaneously with the events, and which are attached and marked as Exhibits E and F.

In addition, I have previously provided you, Mr. Coleman and Ms. Born copies of the affidavits of Judge Griffin Bell, Judge Norman C. Roettger, Jr., Paul W. Eggers, William R. Seaman, William Allen Ogden, III, Joseph P. Hayden, Jr., and Jerry L. Cowan pertaining either to their analysis of my personal disposition during the summer of 1972 or the weight they would give to the Kreider and Berghaussen affidavits, as well as their opinion of my qualifications for the Federal Bench. I trust this answer is in fact responsive to point 1.

(2) The only allegation of back dating a document with which I am familiar is a document concerning a Texas limited partnership, Hillcrest Square, Ltd. I enclose, as Exhibit G, what I believe to be that document. As you can see the document is "made as of September 1, 1975", executed in counterpart and each of the signators notarized in March of 1977 with the signature of Thomas Moody being executed by Mrs. Moody as executrix of the estate of Mr. Moody. At that time I did not represent Hillcrest Square for partnership matters, an attorney by the name of Marvin Lewis in Dallas, Texas did. I did not draft that document, Marvin Lewis did. I did not circulate that document, Marvin Lewis did. I enclose as Exhibit H a letter dated February 12, 1981 from Marvin Lewis to me enclosing a letter of March 11, 1977 from Mr. Lewis to John Osberger in which Mr. Lewis explains why that document was recirculated. I enclose as Exhibits I and J two memorandums to the file from Michael G. Kohn concerning telephone calls from Marvin Lewis pertaining to this matter dated February 12, 1981. It is clear from the document that it is neither post-dated nor pre-dated, but a document made as of September 1, 1975 and executed in counterpart in March of 1977.

As I remember the matter, Mr. Lewis drafted an amendment admitting me to the partnership in December of 1973, inadvertently named me a general partner, and sent the counterparts for execution. It was late in the calendar year, I executed the amendment sent to me and asked that the partnership be further amended making me a limited partner which was my original understanding. Mr. Lewis said he would do that and in 1975 he finally got around to it. Why he did not file the 1975 amendment I do not know. I suspect that in the sale of some property from Hillcrest Square the appropriate partnership amendments were required and that Lewis then recirculated the '75 amendment as he states in his letter of February 12, 1981. Hillcrest Square has not been in a reorganization, nor in bankruptcy, and while counsel for Pittsburgh National Bank tried to use this document as a diversion in the Scioto Park reorganization, it was never relevant and it certainly was never false.

This matter was thoroughly investigated by the U.S. Attorney and the FBI. A separate investigation was conducted prior to my appointment as General Counsel of the Department of Commerce. I have previously provided you, Mr. Coleman and Ms. Born with two affidavits of Bernard J. Gilday, Jr. that pertain to the results of that investigation and the motivation of the complaining party.

In response to the second part of point 2 that I made an alleged false statement concerning my interest in Unit, Inc., I have no knowledge of ever having done that. I have never had an interest in Unit, Inc. I have never claimed to have an interest in Unit, Inc. If anyone is suggesting otherwise it is appropriate to request greater detail under oath.

There was, however, a claim made at one time that I had failed to inform the Court that I was a limited partner of Scioto Park, Ltd. or that such ownership was an interest adverse to the debtor. Attached as Exhibit K is a copy of the Statement of Affairs filed in that matter, prior to even the first meeting of creditors, which in response to question 21 lists me as a partner. Judge Gartner always knew of that interest and simply did not believe a limited partnership interest in a debtor was an interest adverse to that debtor.

(3) My 1968 Federal income tax return was audited shortly after I was nominated to be a member of the Federal Communications Commission. I believe the auditor's principal claim, which was disputed was that I received $166,666.67 as "constructive income" based upon an upstream merger of corporations in which I owned stock. The claim of constructive income had no basis in tax law. I tried to resolve that issue expeditiously but was unable to accomplish that. Accordingly, I retained counsel, filed a protest,

and appealed the matter to the appellate level. The matter was subsequently settled at the appellate level by the payment of $3,023.42 additional tax.

I asked that my nomination to the Federal Communications Commission be withdrawn for two reasons. First, while I believed the tax claim to be specious, the amount of money involved was substantial and I felt I had to concentrate on that issue. Second, the 1970 mid-term election was in full swing, the audit was leaked to the Cincinnati press, bigger than life, even before completion, and would have become an exaggerated issue during my confirmation hearing to the detriment of the Nixon Administration and myself.

I was represented in this matter by William R. Seaman and Jerry L. Cowan of the Cincinnati firm of Frost & Jacobs, both of whom have talked to the ABA and recommended me for the Federal Bench and have in addition prepared affidavits previously provided to you, Mr. Coleman, and Ms. Born.

(4) The only ex parte contacts I had with Judge Gartner were conferences on administration of a Debtor in Possession, generally at the request of Judge Gartner. At the request of Steve Brogan, Deputy Assistant Attorney General, Office of Legal Policy, I attach as Exhibit L a transcript of Judge Gartner's testimony before District Judge Walter K. Stapleton on August 25, 1977 in the matter of Freidco of Wilmington, Delaware. At page 43 of that transcript Judge Gartner explains his responsibility to adjudicate, advise, and administer. It was solely matters of administration upon which conferences were held without the presence of counsel for creditors. In addition, I would like to call your attention to pages 10 and 78 of the transcript wherein Judge Gartner refers to attorney Jay Rosenberg, counsel for Pittsburgh National Bank, giving documents to Judge Gartner pertaining to other reorganizations, in other courts, which caused Judge Gartner to call me to his chambers and "grill" me on the content of some of those extraneous papers (see page 12). Judge Gartner also received papers and letters directly from counsel in the Freidco matter and from the trustee in the Freidco matter even though they refused to enter an appearance (see page 37). Judge Gartner's opinion of my integrity is found on the top of page 30 and again the middle of page 36.

I did not socialize with Judge Gartner. I never had a drink with Judge Gartner. And, at no time was Judge Gartner ever in my law offices or home.

(5) I was never threatened with or held in contempt in the Wilmington bankruptcy proceeding referred to in paragraph 13(H) of the Personal Data Questionnaire. Any suggestion to the contrary is a untrue and cannot be proven.

There was however an incident in the matter of Scioto Park, Ltd. to which the ABA may be referring wherein Judge Gartner stated that he was going to hold me in contempt and fine me. However, no order to that effect was ever entered. Shortly after the incident Judge Gartner called me into his chambers and stated that perhaps he had been a bit hasty and suggested I file an Application for Reconsideration, which I did. The Application for Reconsideration was never ruled upon. No order of contempt was entered, and the Scioto Park reorganization was approved. I attach as Exhibit M the Application for Reconsideration which has attached to it a Memorandum of Law and a transcript of the incident.

(6) The allegation is imprecise and unfair. After two years of dissatisfaction with their lawyers, Piedmont Paper Products, Inc. and Richard G. Donohoo wrote Jacob Stein on April 11, 1978 advising him that they had requested John A. Lloyd, Jr. and myself to enter appearance as additional counsel to represent them. On April 13, 1978 an entry of appearance as additional counsel was filed by Mr. Lloyd and myself in Donohoo v. AFC. On April 15,

1978 Donohoo and Piedmont Paper Products wrote me again expressing their desire and sent a carbon copy to Mr. Stein. On April 17, 1978 Mr. Stein wrote Mr. Donohoo and Piedmont Paper Products that he had seen their letters of April 11 for the first time on on that date. On April 20, 1978, Donohoo and Piedmont wrote Stein and Osberger concerning their perceived lack of cooperation. On April 25, 1978 Mr. Stein wrote Mr. Donohoo and Piedmont. On May 3, 1978 the above entry of appearance filed on behalf of John Lloyd and myself was withdrawn. On May 4, 1978, over two weeks after Mr. Stein returned from his vacation an application to substitute was filed and everyone was given 20 days in which to state any objection to the granting of that application. Copies of the Donohoo and Stein letters, the pertinent page from the docket, the application to substitute trial counsel, and the court order granting 20 days in which to file objections are attached and marked as Exhibit N. I was unaware of Stein's vacation schedule nor was there lack of notice or opportunity to respond to the application to substitute.

(7) "Discharge" is an inflammatory way to characterize that event. While I was General Counsel of the Department of Housing and Urban Development I was nominated to be a member of the Federal Communications Commission. While that nomination was pending the tax audit referred to in point 3 occurred. I was spending most of my time trying to expedite resolution of that matter. The Secretary of Housing and Urban Development wanted his new General Counsel in place and Senator Hugh Scott was anxious to have a fellow Pennsylvanian sworn in. Accordingly, President Nixon relieved me of my responsibilities as General Counsel while my nomination to the Federal Communications Commission was pending. It is worth noting that after I withdrew my nomination to the Federal Communications Commission, President Nixon appointed me to a three-year term as a member of the National Advisory Committee on Economic Opportunity.

(8) I at no time took any fees from debtors without prior court approval. Any allegation to the contrary is untrue and cannot be proven. It is unclear what anyone means when they suggest I "requested approval of excessive fees". If more detail is available I would be pleased to respond further.

(9) I do not believe I have ever orally agreed to an extension of time and then reneged. As a matter of fact, the only incident of which I am aware that even might resemble such an event was in the matter of Unit, Inc. v. Warner. A request for continuance was agreed to with counsel for two of the defendants. Counsel for defendant Warner represented to the court that I would not agree to a stipulation without bothering to even ask me. His

apology for that misrepresentation dated October 18, 1979, along with the correspondence that preceded it, is attached hereto and marked as Exhibit O. My letter of October 10, 1979 is attached in its original form and retyped simply for clarity.

(10) I have no recollection of any such incident and would need more specific allegations before I could possibly respond.

(11) I have no memory of anything like that happening. If anyone has in fact any specific information to the contrary and those alleged facts are furnished me, I would be pleased to respond.

These so called charges are inference, inuendo, and gossip. They lack specificity and fact. As I am certain you know, the rules of professional conduct of the ABA, as well as those of the Ohio Bar Association, require any breach of ethics to be reported immediately to the bar association. Failure to so report is in itself a breach of those rules. In my almost 30 years at the bar I have never had a grievance filed against me. Presumably those practitioners now talking to the ABA did not believe my conduct to be wrong at the time. Only now, when they can hide behind the ABA's purported "cloak of confidentiality", do they come forward. One can reasonably question their real motivation and whether they would in fact be willing to testify under oath.

I do not believe there are facts that place either my integrity or temperament in issue. If you desire more detail or further response on any issue, please contact me.

Very sincerely,

Sherm

Sherman E. Unger

Enclosures

cc: Stephen J. Brogan

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Department of the Treasury

Internal Revenue Service
Washington, DC 20224

Date: Jan. 13, 1972
In reply refer to: CP:D 161-5478

Sherman Edward Unger
2650 Virginia Avenue, N. W.
Washington, D. C.

As a supplement to our report of November 15, 1971, attached is a copy of a Supporting Statement concerning the tax matters of this individual. This case was settled on December 28, 1971.

This completes our report.

I. ISSUES

1. Whether taxpayer realized ordinary income in the form of increased equity or property interest for services rendered co-investors in the amount of $136,667 under Section 61 of the Internal Revenue Code.

2. Value of "other property" received in an exchange under Section 351(a) recognized under Section 351(b) as a long-term capital asset under Section 1202 in the amount of $11,250. (How issue raised by the taxpayer for the Government.)

II. PROPOSAL OF SETTLEMENT

Issue No. 1 - That the Government concede.

Issue No. 2 - That the taxpayer concede.

Note: Inasmuch as the negligence penalty attaches to the entire dificiency (partial agreement not in dispute) the taxpayer concedes the penalty applicable to Issue No. 2.

III. FINDING OF FACTS - LAW AND ARGUMENT

General

Because of the complexities of the issue, along with the designation of "sensitive" to the case, a short recitation of the indirect facts to the issue but germane to the case is deemed appropriate. Because of the close proximity of the two issues it is believed more coherent and less involved to refer to the two issues as one. Mr. Sherman Unger, will hereinafter interchangeably be referred to as the taxpayer and Mr. Unger and Modern Talking Picture Services, Inc., will hereinafter be referred to as MTPS, Inc.

During the month of August 1968 while the examining officer was examining the returns of some other corporate taxpayers and related returns, it came to light that $40,000 was paid to the taxpayer "for right to acquire one-third of all the outstanding common stock of Motion Talking Picture Service, Inc., a Delaware Corporation for the the price of $27.00 per share" (see statements sent to Mr. J.T. Resor, Midwest Venture Capital Corporation, and Ohio Venture Capital Corporation dated June 11, 1965). These amounts were subsequently paid during the month of June 1968. Subsequent examination of the taxpayer's return for the year 1968 disclosed that the $40,000 was not reported by the taxpayer in the year under consideration.

Because of the omission of the income as determined by the District Director, the case was referred to the Intelligence Division of the office of the District Director, which branch after thorough investigation and study withdrew from the case and recommended that prosecution not be instituted(See Intelligence Report dated August 25, 1970.)

While the Intelligence Division was considering the case, the taxpayer filed an amended return in which he included the $40,000 as income less expenses and paid an additional tax of $16,988.99.

Upon further audit examination, after the Intelligence Division withdrew from the case, the office of the District Director determined that the taxpayer realized income from services to co-investors (in the same transaction that gave rise to the $40,000 payment) in the amount of $136,660.67 as recited below. In addition to the $40,000 item a finding was made on other small items and the negligence penalty of 5% was proposed on the deficiency along with the tax due, so that at the conclusion of the audit the taxpayer's deficiency on other than the issue in controversy was $20,748.01 in tax, and $1,037.40 negligence penalty, against which the $16,988.99 was paid on the amended return. Subsequently, the taxpayer paid the balance.

The taxpayer then protested to this Division as recited in Issue No. 1 the following:

Issue No. 1 and 2 - Finding of Fact

In the latter part of 1967, or the forepart of 1968, the exact date not a matter of record, Mr. Unger, the taxpayer, learned that the common stock of Modern Talking Picture Services, Inc., hereinafter referred to as MTPS, Inc., was available for sale by Rosalie M. Arlinghaus, widow of the former MTPS, Inc., and owner of substantially all the shares. A Mr. Eberle held a small amount of the stock.

The offering price of the stock was approximately $2,500.00. It is fairly well documented through the file and admitted by the taxpayer in conference that he was virtually without funds and a substantial line of credit was not available to him. He approached a Mr. Resor and a Mr. Taylor, who had substantial interests in Midwest Venture Capital Corporation and Ohio Venture Capital Corporation. According to the testimony, he recited to them the profit making history and potential of the MTPS business and convinced them that it was an excellent buy, but that he was without funds and that he desired to own one-third of the corporation after its acquisition. They agreed to work out the details of the acquisition.

On May 10, 1968, an offer was tendered to Mrs. Arlinghaus and Mr. Eberle by the taxpayer for all the shares to be purchased for $2,551,500. On May 31, 1968, they accepted the offer of Mr. Unger.

According to the offer, the exact terms were for the acquisition of 94,500 shares at $27.00 per share, or as an alternate, the acquisition of all the assets of MTPS, Inc., for the total amount of $2,551,500 in cash.

It was ultimately agreed to acquire the entire amount of the 94,500 shares. In order to accomplish this a corporation was formed under the name of Modern Media, Inc., as evidenced by the minutes of the meeting of June 7, 1968, which recited that Resor, Unger and Taylor (for Ohio Venture and Midwest Venture Corporations) subscribed to the 600 shares of common stock of Modern Media, Inc., for $150 per share, plus one-sixth hundredth (1/600) of the right to purchase all the outstanding 94,500 shares of Modern Talking Picture Service, Inc., for a full price of $27.00. Of this $90,000 capitalization, our taxpayer, Mr. Unger, contributed $30,000 for his 200 shares of the 600 shares issued. In order to raise the money to acquire the MTPS stock, Modern Media, Inc., effected a loss from the First National Bank of Cincinnati, Ohio, for approximately $2,100,000. In order to raise the balance Resor loaned the corporation $200,000.00 receiving a personal note, and Taylor, through Modern Media and Midwest Venture Corporations loaned the corporation $100,000.00 each, and they in turn each received a note from the corporation. All three notes totaling $400,000.00 were subordinated to the loan of $2,100,000 secured from the First National Bank of Cincinnati, Ohio.

According to the prospectus filed with the Security & Exchange Commission on June 6, 1969, the "historical" net income of the corporation for the year ended June 30, 1968, was 50¢ per share on which a cash dividend of 8¢ per share was paid.

In the stock purchase agreement of June of 1968, between Ensor, Unger, Ohio Venture, Midwest Venture and Modern Media, there is a provision that no stockholders can transfer without consent of any other stockholders, the common stock of Modern Media unless he has offered his stock to Modern Media, the corporation and/or other stockholders and the offer has not been accepted. On August 27, 1968, the 94,500 shares of MTPS, Inc., stock held by Modern Media was split 4 to 1 so that there was then 378,000 shares. In the next month of September there was a sale of MTPS, Inc., debentures of $800,000.00 which was distributed to Modern Media who in turn paid The First National Bank the sum of $800,000.00 as a partial repayment on its loan of $2,100,000.

According to the statements made by Mr. Unger in conference in this Division, he stated that it was never his intention that the stock of MTPS, Inc., go public, but that his two co-investors, Resor and Taylor, prevailed as they could see a prospect of substantial profits from the stock if it was offered to the public. Accordingly, an underwriter was hired to draw up the prospectus and application to the Security & Exchange Commission.

According to the file and the statements made by the taxpayer in conference, the underwriter felt that it was detrimental to the permission sought from the Security & Exchange Commission to go public if the $400,000.00 of indebtedness showed as owing to Resor and the two Venture Corporations remained on the books, albeit, that it was clear that the $400,000.00 was subordinate to the primary obligation of The First National Bank. Accordingly, on December 3, 1968, by letter, Resor and Taylor (on behalf of Ohio Venture and Midwest Venture) tendered their respective notes for the total amount of $400,000.00 marked cancelled, and asked that the total amount be treated as tender as a contribution of capital. The net worth per books of Modern Media immediately following the surrender of the notes on December 3, 1968, was $465,000.00.

On December 4 and December 6, 1968, the stockholders and Board of Directors of Modern Media agreed to effect a "downstream" merger in which Modern Media would be merged into Modern Talking Picture Service, Inc., with the latter the surviving corporation. In order to effect the merger, 650 shares of capital stock of MTPS was exchanged for each share of capital stock of Modern Media. The stockholders in turn were distributed the capital stock of Modern Talking Picture Service, Inc. Accordingly, Mr. Unger, our taxpayer, received 126,000 shares of MTPS, Inc., common stock.

On June 6, 1969, a prospectus for permission to go public was filed with the Security & Exchange Commission. (See copy enclosed in the file.)

According to the statements of Mr. Unger in conference in this Division, the earnings of Modern Talking Picture Service, Inc., took a decided turn for the worst for the year 1969 and upon advice of underwriters the application for going public was withdrawn from the Security & Exchange Commission in November of 1969. On November 21, 1969, as evidenced by the Minute Book of that date, MTPS, Inc., was merged into the KDI Company, a conglomerate based in Cincinnati, Ohio. The details of the merger were that 1 share of KDI common stock would be exchanged for each 4 shares of MTPS common stock. According to the taxpayer in conference in this Division there was a restriction, however, upon the 50,400 shares that he received in the exchange in that he had to secure the permission of the Board of Directors of KDI for the sale or disposition of the KDI common stock.

In late 1970, or early 1971, the KDI Company experienced financial difficulties and is presently operating under a creditor's committee after filing a petition for reorganization under Chapter XI of the Bankruptcy Act. According to statements made in conference in this Division the stock sells for $1.50 to $2.00 per share if permission is secured from the corporation to sell such stock because of Security Exchange Commission's rules relating to "pooling of interest." As of January 4, 1971, the value of the total investment of all former stockholders in MTPS, Inc., was $187,500 (see page 6 of the Protest.)

Law and Argument

Upon receipt of the offers of acceptances dated May 31, 1968, of the taxpayer's offer to purchase the MTPS stock from Mrs. Arlinghaus and Mr. Eberle, the taxpayer and Messrs. Resor and Taylor (for the Venture Corporations) organized Modern Media, Inc., and effected a transfer of their rights to acquire the MTPS, Inc., stock, plus $150 in cash for each of the common shares of Modern Media, which latter corporation had been organized for the actual purchase of the MTPS common stock. Mr. Unger had sold to Messrs. Resor and Taylor (for the Venture Corporations) two-thirds of his rights to the acquisition of MTPS stock for $40,000, half of which was billed as acquisition of rights $20,000 and the balance of $20,000 as expenses incurred. No part of the $40,000 was reported as income on the original return filed by the taxpayer, but after the examination of his return was started an amended return was filed in which he reports the sale of two-thirds of his rights for $40,000 less reimbursement costs for a balance of a short-term capital gain of $36,556.85. In a subsequent audit of this return the District Director determined that from the transaction $37,306.14 was for "services" in lieu of the above amount reported as a short-term capital gain by the taxpayer on his amended return. The deficiency in tax plus negligence penalty on this transaction was subsequently paid.

In addition to the above amount, the District Director determined that in this same transaction he received $136,666.67 as "services to co-investors." The District Conference Report through the uniform issue number (0061.09-00) label this amount income under Section 61 of the Code. In addition thereto, the examining officer proposes that this amount is within the purview of the last sentence of Section 351(a) which reads -

> "For purposes of this section, stock or securities issued for services shall not be considered as issued in return for property."

The essence of the District Director's position is that the loans of $400,000.00 by Resor and the two Venture Capital Corporations were in substance contributions of capital because the corporation was "thinly" capitalized. Because the taxpayer was not required to put up an additional one-third, his one-third investment in the corporation was enhanced to the extent of the one-third of the loans when considering that in substance they were capital contributions as evidenced by their conversion to this category as paid-in capital on December 3, 1968. It is further argued in the preliminary determination that when the "thin capitalization" doctrine is applied to the debt vs. equity facet of the issue that a substantially disproportionate distribution of stock to the taxpayer was received by Mr. Unger in payment of Mr. Resor's and Mr. Taylor's part of the two corporations' obligations to the taxpayer. Section 1.351-1(b)(1) of the Regulations is cited.

The so-called "thin capitalization" doctrine is fraught with substantial hazards in litigation as are all issues in which substance is being argued over form. Support for this doctrine finds its genesis in this venue in the case of Gooding Amusement Company, Inc., 236 Fed. 2d. 159, 49 AFTR 1973, when the Circuit Court of Appeals for the 6th Circuit (which would be the venue for our taxpayer) decided in 1956 that notes in that case were in substance equity capital. It was a strong decision for the Government and it was quoted and applied with great force and effect. Then in the year 1960 the same Circuit Court of Appeals in the case of Byerlite Corporation, 6 AFTR, 2d. 6069, in effect backed away from its decision in Gooding Amusement Company, Inc., supra. (at least to some extent) and decided in favor of the taxpayer. There followed various adverse decisions to the Government of this "thin capitalization" issue such as in the case of Toulisses (sp) vs. 1661 Corporation, 377 Fed. 28, 291, 19 AFTR 21 1413, CCA-5 (1067); and J.S. Biritz Construction Company, 367 Fed. 2d. 451, 20 AFTR 2d. 5801, CCA-8, (1967). As a consequence the doctrine of "thin capitalization" is today highly litigated with its outcome in doubt.

But what appears to be even more detrimental to the successful litigation of this case is that the Commissioner has to effect what amounts to a creation of income over and above the $40,000 reported in order to give rise to an amount which was omitted from taxation by the taxpayer. This facet of Federal income taxation was dealt with quite forcibly in the case of Bolcoy vs. Commissioner, 2 AFTR 2d., 5660, 258 Fed. 2d. 865, CCA-3, 1958. The opinion of the Court and its dictum will be further discussed.

The taxpayer, on the other hand, is quite vehement both in the conference and the protest filed that the $40,000 received from Resor and Taylor (on behalf of the two Venture Corporations) completely satisfied the "finder's fee" of sale of rights reported as a short-term capital gain and that no further incident of taxation arose or is appropriate in the transaction. They direct our attention to the affidavits of Mr. Resor and Mr. Taylor that they considered the $400,000.00 in notes as valid and binding obligations of Modern Media, Inc., and they fully expected to be repaid for such loans. Page 9 and again on Page 13 of the Protest, they state that the direction to the officers of Modern Media, Inc., in December of 1968, to transfer their $400,000.00 in loans to capital contributed had no bearing whatsoever upon their expectations of repayment in June of 1968 because it was not until December of 1968 that the underwriters proposed this action prior to MTPS, Inc., stock going public.

The thrust of the District Director's position is that Mr. Unger went into the proposition with Taylor and Resor with the understanding that he would eventually own one-third of the outstanding common stock of MTPS, Inc., without investment of dollars or credit, neither of which he had; and once having obtained this objective, which he did in our taxable year, there arose an incident of taxable income that must be taken into account. There is no question but that the $40,000 paid in cash as a finder's fee is taxable income. The tax has now been paid on this amount. The amount of $30,000 of this $40,000 received was invested in Modern Media, Inc., which after a downstream merger into MTPS, Inc., resulted in the taxpayer receiving one-third or 126,000 shares of the outstanding common shares of MTPS, Inc. When a very limited number of shares were sold subsequent to the year under consideration, capital gain was reported using as a basis the allocable part of the $30,000 invested.

Aside from the above finder's fee of $40,000, where is the necessary ingredients to fix an amount of taxable income for the year under consideration? The District Director maintains that the loans made to Modern Media were in substance equity capital and the taxpayer's investment was enhanced in the amount of $136,667.00.

The Third Circuit Court of Appeals in the opinion of Halsey vs. Commissioner, supra, strongly mitigates against this creation of income when it states in its opinion--

> "But these benefits operated only to increase the value of the taxpayer's stock holdings; they could not give rise to taxable income within the meaning of the 16th Amendment until the corporation makes a distribution to the taxpayer or his stock is sold." Eisner vs. Macomber, 1900, 252 US 189 (3 AFTR 3020); Schmidt vs. Commissioner of Internal Revenue, COA-3, 1954, 208 F. 2d 819 (45 AFTR 37).

Further, in this opinion, the Court in citing Ferro (sp) vs. Commissioner of Internal Revenue, 50 AFTR 2084, 2087, Third Circuit, 1967, 242 Fd. 838, 841, comments:

> "The application of that criteria (stated in the Ferro vs. Commissioner case) to the facts of this case compels the conclusion that in the absence of a direct promiary (sp) benefit to the taxpayer the Tax Court erred in holding the distribution in question taxable to him." (Underscoring supplied.)

However, the magnitude of the transaction is such that it is almost impossible to envision the situation where the Government would have absolutely no merit. For example, if MTPS, Inc., would have been successful in going public the taxpayer stood to gain between $1,500,000.00 and $2,000,000.00 on his $30,000 investment according to the speculation of the underwriters, who projected the MTPS, Inc., stock as selling between $12 to $16 per share.

But in the year 1969 the application to go public was withdrawn when the earnings of MTPS, Inc., turned downward. The subsequent trade of the MTPS, Inc., stock for KDI stock could eventually result in a very profitable transaction, but again this is speculation, that runs afoul of the pronouncement as set forth in Holsey, supra.

The representatives recognize that the Government does have some merit in that the taxpayer realized something more than just the $40,000 in securing the right to the acquisition of all the MTSP, Inc., stock on May 31, 1968. The question remains as to how to value this "right" to acquire all of MTPS, Inc., common stock. Solely for the purpose of settlement the representatives proceed down the line of the $400,000.00 in loans eventually enhancing the capital structure of Modern Media when the notes were cancelled by the other shareholders and converted to paid-in capital on the books of Modern Media, Inc., on December 3, 1968. For purposes of settlement there is recognized as enhancement of the taxpayer's investment as of December 3, 1968, as set forth in the written offer of settlement dated November 9, 1971, enclosed in the file. But the point is made quite forceably that the $400,000.00 in notes did not have a fair market value anywhere near the face amount as they were subordinated to a $2,000,000 loan with the First National Bank of Cincinnati, Ohio. Taking into account this undetermined face value of the notes, along with the fact that our taxpayer was a minority stockholder, along with the fact that the stock was subject to a restrictive agreement in that it was to be sold first to the corporation or other stockholders, a determination for a settlement is proposed in the amount of $41,250.00 as a value to be recognized. From this amount the $30,000 invested by our taxpayer in the capital stock is subtracted and leaving the value of the $11,250.00 which is to be recognized as "other property" received in the exchange under Section 351(b) of the Code and Regulations Section 1.351-2. For purposes of settlement, this, of course, is to be considered a capital asset held for a period of longer than 6 months, the holding period running from May 31, 1968 until December 3, 1968, the date when the notes were surrendered to the corporation and transferred on the books of Modern Media, Inc., from loans payable to paid-in capital.

IV. CONCLUSION

It is concluded that the offer be accepted as representing the value of the case when including the $40,000 "fee" already taxed and paid.

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AFFIDAVIT

THE STATE OF TEXAS)
)
COUNTY OF DALLAS)

BEFORE ME, the undersigned notary public, on this day personally appeared Paul W. Eggers who, being by me duly sworn, upon his oath says:

My name is Paul W. Eggers. I am a resident of Dallas, Texas, and am President of Eggers & Greene, A Professional Corporation. I am a member of the State Bar of Texas, having been admitted as a member in 1948.

I have carefully reviewed the Affidavit, a copy of which is attached hereto, which I executed September 14, 1970. The facts stated therein are true and correct and I remember executing the Affidavit which is attached hereto.

Paul W. Eggers

Paul W. Eggers

SUBSCRIBED AND SWORN TO before me this 14th day of October 1983.

May W. Logan

May W. Logan
Notary Public in the State of Texas

My Commission Expires:
November 30, 1984

September 14, 1970

AFFIDAVIT

My name is Paul W. Eggers. I am a resident of Wichita Falls, Texas, and a member of the State Bar of Texas, having been admitted as a member in 1948. Most of my practice was in the field of Federal Taxation and I have been past Chairman of the Tax Section, State Bar of Texas. On April 1, 1969, I was appointed by the President of the United States as General Counsel of Treasury, which position I resigned on March 20, 1970. Presently I am the Republican Candidate for Governor of the State of Texas.

While I was in Washington I became acquainted with Sherman Unger, who was General Counsel of HUD. In December, 1969, Mr. Unger called me at my office in Treasury inquiring about the tax aspects of the new Capital Gains provisions of the 1969 Tax Reform Act. He stated he was negotiating on a sale of Capital stocks. I referred him to another office for this information.

In January, 1970, we attended a reception at the Federal Bar Building for Justice Tom Clark. Mr. Unger did not have a car and I offered to take him home. We stopped on the way home at a club. During the course of visiting, I asked Mr. Unger if he obtained the information he needed on the tax law. In the course of our conversation he told me that he had discovered that he failed to include some income from a sale in his tax return, which he had filed at the last moment on April 15, 1969. He did not state the amount or type of transaction. I advised him to file an amended return and include a letter of explanation stating the facts as to the reason for the oversight. Shortly after talking to Mr. Unger about his omission of income, I advised Mr. Martin Worthy, Chief Counsel of the Internal Revenue Service, of the fact that Mr. Unger had told me about his omission and that I had advised him to file an amended return. Mr. Worthy, as I remember, agreed that my decision was correct.

/s/ Paul W. Eggers

STATE OF TEXAS

COUNTY OF TARRANT

Sworn and subscribed to before me a Notary Public in and for the County of Tarrant, State of Texas, on the 14th day of September, 1970.

/s/ Dorothy R. Dutton

EIGHTEENTH FLOOR
FIRST NATIONAL BANK CENTER
CINCINNATI, OHIO 45202

18A

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FIRST NATIONAL BANK CENTER
CINCINNATI, OHIO 45202

1983 SEP 26 PM 4:33

September 22, 1983

The Honorable Strom Thurmond
Chairman
Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Thurmond:

It is now expected that next Thursday, September 29, a hearing will take place before your Committee on the confirmation of Sherman E. Unger, formerly of this city, to serve as Judge on the Federal Court of Appeals in Washington. I have been asked to address this letter to you by Ms. Brooksley E. Born, Chairperson of the American Bar Association's Standing Committee on Federal Judiciary. As you must know, that Committee has unanimously voted, after a long and careful investigation of Mr. Unger's suitability to serve as a Federal Judge, that he is not qualified for that position. Since the position to which Mr. Unger has been nominated is one of high judicial importance, demanding utmost integrity and ability in the discharge of its responsibilities, it is readily apparent that I should comply with Ms. Born's request. The fair, just and intelligent resolution of cases submitted to that court in which he is called on to participate is directly involved. The nomination of a man to be a Federal Judge is not a matter to be treated casually by anyone, particularly by the President of the United States. Although I am a strong Republican and have supported President Reagan in much that he is trying to do, I am convinced that he was poorly advised and badly misled in making this nomination.

In my relations with Mr. Unger a number of years ago, I found him to be untrustworthy, devious and manipulative, as well as unscrupulous when in a position not to be called to account. This behavior was exemplified by ceaseless obstruction in a most unprofessional way of the examination of a witness by authorized deposition in another state shortly before trial when no relief was realistically feasible. It was also exemplified by ex parte conversations with the Trial Judge when the latter was in another state during a recess in the trial of a case--without notice to opposing counsel--to obtain an order permitting a deposition then to be taken in California for use when the trial of the case resumed. Oral statements by him could in no way be relied on when it suited his changing position to ignore them or even to deny that they were said. These experiences occurred during the trial and preparation of the case of W. R. Grace & Co. v. Hargadine, et al. in the Federal District Court here in April and May, 1966. Others in this office have had similar experiences with him. This unfortunate behavior finds support in his reputation here for trustworthiness and for truth and veracity. That reputation, with which I am acquainted, is not good.

Since those days, more important occurrences have taken place, in which this firm has been directly or peripherally involved. These occurrences serve to confirm in a most convincing way that Sherman Unger is not qualified to occupy the high position he now seeks. One of these occurrences involved a Chapter XII proceeding in the Bankruptcy Court in Wilmington (Freidco of Wilmington, Delaware, Ltd.) and a

Chapter XI proceeding in the Bankruptcy Court here in Cincinnati (Unit, Inc.) in which this firm represented a creditor. Mr. Unger represented the debtor in both instances. The Delaware proceeding was appealed to the Federal District Court in Wilmington and then to the Third Circuit. It became apparent through close questioning of Mr. Unger and through testimony of the Bankruptcy Judge in Cincinnati, who appeared and testified in the Wilmington proceeding, that Mr. Unger had successfully sought ex parte relief from the Cincinnati Bankruptcy Judge in the Chapter XI proceeding, which had a direct bearing on the Chapter XII proceeding in Delaware and could have resulted in the Wilmington proceeding's being placed under the control of the Cincinnati Bankruptcy Court. No notice was given to any other counsel involved in either of these proceedings. The District Court in Wilmington so found on appeal from the Bankruptcy Court there, and issued an injunction prohibiting Mr. Unger's clients from interfering in the Cincinnati Bankruptcy Court with the Wilmington proceeding. When questioned about his ex parte actions in Cincinnati by the Third Circuit on a further appeal, Mr. Unger's "defense" was that the practice in Ohio was different from the practice in Delaware or Pennsylvania in the matter of ex parte conferences seeking court action, particularly Bankruptcy Court action, and also that he was conferring with the Bankruptcy Judge on purely an "administrative" matter. The Third Circuit put to rest the second part of his defense and, in looking askance at what Mr. Unger had done, viewed the matter as purely judicial. See transcript of oral argument before Third Circuit, August 7, 1978, pp 34-37. That being the case, as is made perfectly clear from a reading of the record, it may also be said, contrary to Mr. Unger's assertion, that the practice in Ohio is no different from the practice elsewhere. In all situations except that of utter emergency (and even then notice promptly follows) notice of a prospective conference with a court is always given to interested counsel in the most effective way available. It is suspected that Mr. Unger was well aware of this at the time but chose to ignore it in the belief that he would never be challenged, in order to strengthen his position in the Delaware proceeding. The Third Circuit responded to Mr. Unger's appeal by affirming the District Court on the same day of the oral argument--August 7, 1978. In re Freidco of Wilmington, Del., 582 F.2d 1274.

The second occurrence coming to my attention which involved unusual behavior came to the surface in 1978 during the course of a stockholders' derivative action entitled Donohoo, et al. v. American Financial Corporation, et al. (No. C-1-76-277 in the Federal District Court here). Two years after the case was filed in 1976, plaintiffs sought to change counsel by substituting Mr. Unger for their record counsel. Mr. Unger filed his application for substitution. Various objections and affidavits were filed, including affidavits of Gary P. Kreider and Charles Berghaussen attached to a Supplemental Memorandum of Defendant American Financial Corporation, et al. in opposition to Mr. Unger's application. Copies of such affidavits are attached hereto. This firm represented certain individual defendants and took an active part in the case, including strong opposition to his application to be substituted as plaintiffs' trial attorney. The threats of

Mr. Unger upon learning of his dismissal in 1972 as Vice-President of American Financial Corporation ("AFC"), as set forth in the affidavits, caused disruption at the headquarters of the company, and some, including Carl H. Lindner (one of the defendants whom we represented), left the building quickly. Mr. Unger barricaded the door to his office and it was some time before the door could be forced open. ✓

There were extensive filings on the application of Mr. Unger in the Donohoo case against his former employer. The application was denied in a careful and lengthy opinion by the District Judge, Timothy S. Hogan, which was affirmed in the Court of Appeals when Mr. Unger, not the plaintiffs, took an appeal on his own behalf. The relevant point here is the complete disregard by Mr. Unger of the effect of his prior employment by AFC and his disdain of the appearance of propriety and discreet professional conduct when faced with the opportunity to intrude into an important case against his former employer, which was also likely to entail a large fee.

Mr. Unger's intellectual equipment has the potential to serve him well. However, intelligence without integrity is dangerous. Therein lies the rub here. Those not having an adversary relationship with him may be excused for not seeing this side of the nominee; his clothing is dropped in an adversary struggle, whereas in a social or joint venture association he is more apt at keeping it in place. This marked deficiency in integrity and frequent disregard of even the appearance of propriety, when seeking an end by almost any means and accompanied by only slight risk of being called to account, flash danger signals that cannot be ignored. He should not be nominated to be a Federal Judge, where these unfortunate traits would be most likely to flower.

If it is suitable for your purposes, this letter with its enclosures may be made a matter of public record.

Sincerely,

Robert T. Keeler

Robert T. Keeler

bjh
Enclosures
cc Ms. Brooksley E. Born

TAFT, STETTINIUS & HOLLISTER
FIRST NATIONAL BANK CENTER
FOUNTAIN SQUARE
CINCINNATI, OHIO 45202
513-381-2838
CABLE TAFTHOL TWX 810-461-2623
DAYTON, OHIO TELEPHONE 223-0080
WASHINGTON OFFICE
SUITE 708
1800 MASSACHUSETTS AVENUE, N. W.
WASHINGTON, D. C. 20036
202-223-6881
ROBERT TAFT, JR.

B

OF COUNSEL

January 17, 1983

CONFIDENTIAL

Fred F. Fielding, Esq.
Counsel to the President
The White House
Washington, D.C. 20500

Re: Sherman E. Unger

Dear Mr. Fielding:

It has come to my attention that Sherman E. Unger, formerly of this city and now General Counsel of the Department of Commerce, was nominated last month for Judge on the new Federal Court of Appeals in Washington. Since there is now a new Congress in session, it may be necessary to renominate Mr. Unger if the matter is to be pursued. I have been called by Lewis H. Van Dusen, Jr. of the Philadelphia Bar, a member of the ABA Standing Committee on Federal Judiciary, who disclosed to me that the Committee had found Mr. Unger to be not qualified for the appointment. I have also been requested to address this letter to you by William T. Coleman, Jr. of the District of Columbia Bar, another member of the ABA Committee.

I have known Sherman Unger for many years and am acquainted with his reputation here. I have had no professional experiences with him in recent years. However, in my relations with him some years ago I found him to be untrustworthy, devious, and manipulative, as well as unscrupulous when in a position not to be called to account. This behavior was exemplified by ceaseless obstruction of the examination of a witness by authorized deposition in another state shortly before trial when no relief was realistically feasible and also by ex parte conversations with the Trial Judge in another state during a trial recess--without notice to opposing counsel--to obtain a favorable order affecting the trial of the case. Oral statements by him could in no way be relied on when it suited his changing position to ignore them or even deny that they were said. Others in this office have had similar experiences with him in the past. Moreover, his reputation for trustworthiness and for truth and veracity in this area is not good.

Since those days, more important occurrences have taken place, in which this firm has been directly or peripherally involved. These occurrences serve to confirm in a most convincing way that Sherman Unger is not qualified to occupy the high position he now seeks. One of these occurrences involved a Chapter XII proceeding in the Bankruptcy Court in Wilmington (Freidco of Wilmington, Delaware, Ltd.) and a Chapter XI proceeding in the Bankruptcy Court here in Cincinnati (Unit, Inc.) in which this firm represented a creditor. Mr. Unger represented the debtor in both instances. The Delaware proceeding was appealed to the Federal District Court in Wilmington and then to the Third Circuit. It became apparent through close questioning of Mr. Unger and through testimony of the Bankruptcy Judge in Cincinnati, who appeared and testified in the Wilmington proceeding, that Mr. Unger had sought ex parte relief from the Cincinnati Bankruptcy Judge in the Chapter XI proceeding, which had a direct bearing on the Chapter XII proceeding in Delaware. No notice was given to any other counsel involved in either of these proceedings. When questioned about this by the Third Circuit, Mr. Unger's "defense" was that the practice in Ohio was different from the practice in Delaware or Pennsylvania in the matter of ex parte conferences seeking court action, particularly Bankruptcy Court action, and also that he was conferring with the Bankruptcy Judge on purely an "administrative" action. The Third Circuit put to rest the second part of his defense and, in view of the circumstances of the cases, viewed the matter as purely judicial. That being the case, as is made perfectly clear from a reading of the record, it may also be said, contrary to Mr. Unger's assertion, that the practice in Ohio is no different from the practice elsewhere. In all situations except that of utter emergency, notice of a prospective conference with a court is always given to interested counsel in the most effective way available. It is suspected that Mr. Unger was well aware of this at the time but chose to ignore it in order to strengthen his position in the Delaware proceeding.

The second occurrence coming to my attention which involved unusual behavior came to the surface in 1978 during the course of a stockholders' derivative action entitled Donohoo, et al. v. American Financial Corporation, et al. (No. C-1-76-277 in the Federal District Court here). Two years after the case was filed in 1976, plaintiffs sought to change counsel by substituting Mr. Unger for their record counsel. Mr. Unger filed his application for substitution. Various objections and affidavits were filed, including affidavits of Gary P. Kreider and Charles Berghaussen attached to a Supplemental Memorandum of Defendant American Financial Corporation, et al. in opposition to Mr. Unger's application. Copies of such affidavits are attached hereto. This firm represented certain individual defendants and took an active part in the case, including strong opposition to his application to be substituted as plaintiffs' trial attorney. The threats of Mr. Unger upon learning of his dismissal in 1972 as Vice-President of American Financial Corporation ("AFC"), as set forth in the affidavits, caused disruption at the headquarters of the company, and some, including Carl H. Lindner (one of the defendants whom we represented), left the building quickly. Mr. Unger barricaded the door to his office and it was some time before the door could be forced open.

There were extensive filings on the application of Mr. Unger in the Donohoo case against his former employer. The application was denied in a careful and lengthy opinion by the District Judge, Timothy S. Hogan, which was affirmed in the Court of Appeals. The relevant point here is the complete disregard by Mr. Unger of the effect of his prior employment by AFC and his disdain of the appearance of propriety and discreet professional conduct when faced with the opportunity to intrude into an important case against his former employer, which was also likely to entail a large fee.

Mr. Unger's intellectual equipment has the potential to serve him well. However, intelligence without integrity is dangerous. Therein lies the rub here. The marked deficiency in integrity and the disregard of even the appearance of propriety, and perhaps the utter disdain of it, flash danger signals that cannot be ignored. He should not be nominated to be a Federal Judge.

Sincerely yours,

Robert T. Keeler

bjh
Enclosures
cc: Lewis H. Van Dusen, Jr., Esq.
William T. Coleman, Jr., Esq. ✓

C

TAFT, STETTINIUS & HOLLISTER
FIRST NATIONAL BANK CENTER
FOUNTAIN SQUARE
CINCINNATI, OHIO 45202
513-381-2838
CABLE: TAFTHOL TWX: 810-461-2823

WASHINGTON, D.C. OFFICE
SUITE 800
21 DUPONT CIRCLE, N.W.
WASHINGTON, D.C. 20036
202-223-6881

COLUMBUS, OHIO OFFICE
SUITE 1000
33 NORTH HIGH STREET
COLUMBUS, OHIO 43215
614-221-2838

DAYTON, OHIO TELEPHONE 222-0060

May 23, 1983

The Hon. Howard M. Metzenbaum
United States Senate
Washington, D.C. 20510

Dear Senator Metzenbaum:

You are a member of the Senate Judiciary Committee. I am told that sometime next month there will be a hearing before that Committee, or a subcommittee, in the matter of the confirmation of Sherman E. Unger, who has recently been nominated by the President to be Judge of the new Federal Court of Appeals in Washington. For many years Mr. Unger was a practicing lawyer here in Cincinnati. He also served for a while as Vice President of American Financial Corporation here. I believe he is now serving as General Counsel of the Department of Commerce.

Although I have had no professional experience with him in recent years, I have known Sherman Unger for quite a while and am acquainted with his reputation here. I have been asked by Lewis H. Van Dusen, Jr. of the Philadelphia Bar, a member of the ABA Standing Committee on Federal Judiciary, to address this letter to you as a member of the Senate Judiciary Committee. It was Mr. Van Dusen who first disclosed to me last December that the ABA Standing Committee had unanimously found Mr. Unger to be not qualified for this appointment. Since the position to which Mr. Unger has been nominated is one of high judicial importance demanding utmost integrity and ability in the discharge of its responsibilities, it is readily apparent that I should comply with Mr. Van Dusen's request. The fair, just and intelligent resolution of cases submitted to that court in which he is called on to participate is directly involved. The nomination of a man to be a Federal Judge is not a matter to be treated casually by anyone, particularly by the President of the United States. Although I am a strong Republican and have supported President Reagan in much that he is trying to do, I am convinced that he was poorly advised and badly misled in making this nomination.

In my relations with Mr. Unger a number of years ago, I found him to be untrustworthy, devious and manipulative, as well as unscrupulous when in a position not to be called to account. This behavior was exemplified by ceaseless obstruction in a most unprofessional way of the examination of a witness by authorized deposition in another state shortly before trial when no relief was realistically feasible. It was also exemplified by ex parte conversations with the Trial Judge when the latter was in another state during a recess in the trial of a case--without notice to opposing counsel--to obtain an order permitting a deposition then to be taken in California for use when the trial of the case resumed. Oral statements by him could in no way be relied on when it suited his changing position to ignore them or even to deny that they were said. These experiences occurred during the trial and preparation of the case of W. R. Grace & Co. v. Hargadine, et al. in the Federal District Court here in April and May, 1966. Others in this office have had similar experiences with him. This unfortunate behavior finds support in his reputation here for trustworthiness and for truth and veracity. That reputation, with which I am acquainted, is not good.

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Gary P. Kreider and Charles Berghaussen attached to a Supplemental Memorandum of Defendant American Financial Corporation, et al. in opposition to Mr. Unger's application. Copies of such affidavits are attached hereto. This firm represented certain individual defendants and took an active part in the case, including strong opposition to his application to be substituted as plaintiffs' trial attorney. The threats of Mr. Unger upon learning of his dismissal in 1972 as Vice-President of American Financial Corporation ("AFC"), as set forth in the affidavits, caused disruption at the headquarters of the company, and some, including Carl H. Lindner (one of the defendants whom we represented), left the building quickly. Mr. Unger barricaded the door to his office and it was some time before the door could be forced open.

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Sincerely,

Robert T. Keeler

Robert T. Keeler

bjh
Enclosures
cc Lewis H. Van Dusen, Jr., Esq.
William T. Coleman, Jr., Esq.

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION

W. R. GRACE & COMPANY,)
Plaintiff)
v.) Civil Action No. 5723
CLYDE C. HARGADINE, ET AL.,)
Defendants)

MEMORANDUM AND CERTIFICATION

I, C. G. Neese, at all pertinent times a duly designated United States District Judge for the Southern District of Ohio, hereby certify that Robert L. Keeler, Esq., leading counsel for the successful plaintiff herein, in my presence so obstructed the proper administration of justice herein as to block me in the performance of my judicial duties, by a course of conduct long continued in the face of official and unofficial warnings by me, which not only offended my personal sensitivities, but also prejudiced the expeditious, orderly and dispassionate conduct of the trial. I have awaited the filing of this certificate until a substantial judgment returned for the plaintiff had been affirmed on appeal and further proceedings herein have been obviated by the satisfying of such judgment by the defendants.

This was an unusual, difficult and complex lawsuit. The litigants were represented by two of the leading law firms in a large metropolitan area. Counsel estimated that its trial could not be concluded in a period of less than two months. There were many witnesses and some 5,000 exhibits. I was dealing with a randomly-selected jury panel for the first time, and was working with each of its members for the first time.

From my first confrontation with counsel in a pretrial conference in Columbus, Ohio on January 27, 1966 until its conclusion in June of that year, Mr. Keeler complained about virtually every procedural and evidentiary ruling by the Court which was not in complete accord with his own version. So great was the obstructionist tactics of plaintiff's counsel that I, at one point in the proceedings expressed to counsel the concern that Mr. Keeler's conduct might be such as to tend to cause an injustice to be done to his client.

I

At the aforementioned conference, as I have done now for nearly seven years, I began the process of listing in the pretrial order the names of the witnesses, calling first on Mr. Keeler to list his witnesses and to supply adversary counsel with any information desired as to the identity, whereabouts, and general nature of the testimony of each witness. Mr. Keeler declined to do the latter, stating that he would not consider so doing unless directly ordered so to do by the Court. The authenticity of this procedure never before having been questioned, I was not advised whether the Court had the power to make such an order, and I would not so order unless satisfied that the power was extant.

Subsequently, I thus satisfied myself, but to alleviate all doubt about the matter, I requested the (then) other two active judges of the District to join me in the promulgation of a rule for the District along these lines. They acquiesced. Although further consideration of this matter was held under advisement by the Court, at a second pretrial conference counsel announced that each was satisfied as to the identity, whereabouts, and nature of the testimony of each witness.

On the first day of the trial, several witnesses were sworn and, on demand of counsel, sequestered under the rule. Counsel were admonished that, as the rule had been requested, it would be the personal responsibility of each to see that no witness, not then physically placed under the rule, was in the courtroom before testifying and to have sufficient witnesses available at all times to assure that no delay would occur because of the absence of witnesses.

On Wednesday, May 4, 1966, Mr. Keeler had no witnesses available to testify. His obstructionism rendered it necessary to adjourn for the day one-half hour earlier than scheduled. Following adjournment that day, counsel were advised in a chambers conference that unless witnesses were scheduled so as to utilize to the maximum the limited time when the jury was present, the Court would require all witnesses to come into court, be sworn and sequestered.

This warning went unheeded. A scant two days afterward as the scheduled adjournment hour approached, Mr. Keeler, who appeared to be engaging in stalling tactics with his examination, devoted some five to fifteen minutes to dictating a lengthy objection into the record out of the hearing of the jury. Thereafter, he requested and was granted a bench conference, at which the following occurred:

> (At bench conference:)
>
> "MR KEELER: * * * I have no further questions, and I don't like to just 'mark time'."
>
> "THE COURT: The Court doesn't want you to 'just mark time'. * * * Is that what you are doing now, 'just marking time'?"
>
> "MR. KEELER: No, I am not, Judge. I had an interesting point * * * , but I will abandon that. Then I will announce that I have finished my examination at this time, your Honor."
>
> (In open court:)
>
> "THE COURT: Call your next witness."

"MR. KEELER: May I approach the bench, your Honor?"

(At bench conference:)

"MR. KEELER: * * * I am unable to move forward * * * ."

"THE COURT: [Do] you mean you don't have another witness present?"

"MR. KEELER: Well, I --- I think this is ---."

"THE COURT: Do you have any other witness present, Mr. Keeler?"

"MR. KEELER: I don't think there is any out in the witness room. * * * "

On the following morning, after court was opened and both sides announced ready to proceed, the following occurred:

"THE COURT: * * * Bring all of the witnesses in from the witness room, and we will swear those who were not sworn; but, bring all of them in."

* * * * *

(Witnesses were sworn.)

"THE COURT: Now, the witnesses who were sworn yesterday and are sworn today are under the custody of this Court. They are not to leave the witness room without the permission of the Court, except at adjournment time, and they are to return at the time the court is to reconvene.

"Where are the witnesses who were sworn yesterday?"

"MR. KEELER: The other witnesses are not here. Some of them are here in the city. Mr. Clawson is not here. * * * "

"THE COURT: The record shows the names of those witnesses. If they are not gotten back immediately the Court will issue such process as is necessary to get them here and keep them here. * * * "

(Conference at chambers:)

"MR. KEELER: Your Honor, * * * Miss Curtin, who was here yesterday, left this morning * * * [for] Miami, Florida to attend * * * a big DuBois sales meeting * * * . Mr. Clawson returned to his home in New Jersey yesterday as soon as he was excused."

"THE COURT: He was not excused, Mr. Keeler."

"MR. KEELER: Well, your Honor --- ."

"THE COURT: If anybody excused him, you excused him. The Court did not."

"MR. KEELER: I didn't --- ."

"THE COURT: Why do you think the Court put that order down and spent all Saturday afternoon, or Saturday morning, up here to bring these witnesses here? And then you let them go. Now, these witnesses, once they were sworn in, * * * are under the sequestering rule, and they are under the control of the Court, and I want those witnesses back here!"

"MR. KEELER: Well, your Honor, the record did not indicate yesterday that they were to remain here."

"THE COURT: I think you are assuming an awful lot."

"MR. KEELER: In fact, if I am not mistaken, and I may be mistaken, I asked that they be excused. But, I disagree strongly with this order. With due respect to the Court, I think the Court has no right to do this."

"THE COURT: Well, you have a right to seek a * * * mandamus, I guess."

"MR. KEELER: Well, your Honor, I think we are all servants of the law on these matters."

"THE COURT: Well, the Court is absolutely convinced of its right to do this, or the Court would never have done it."

"MR. KEELER: * * * I wish the record to show that at our meeting on Wednesday, May 4, your Honor did not say to me that if these witnesses are not --- 'if this happens again I will put the witnesses --- have them called in and be sworn and sequestered.' The most that your Honor said * * * was that you might find it necessary to enforce 'the rule'. And, this rule is your Honor's 'rule'. We do not have such a rule here, and I never heard of such a rule. Your Honor cited this rule at the pretrial conference; but, when your Honor said that, * * * I had no idea what your Honor was talking about * * * . Your Honor did say to me in so many words, 'If this happens again, I will require all of these witnesses to be present, to be sworn, and they will be sequestered.' * * * It was a very friendly meeting."

"THE COURT: It was a very friendly meeting. The Court could have been very provoked with you, and inwardly was, because you had taken it upon yourself to schedule your witnesses in such a way that we finished up, not only thirty minutes ahead of time, but that you had been 'filibustering' and 'marking time' for some little bit, in the Court's opinion. The Court did say that to you. The Court will not again be guilty of having any conference in which you are involved, Mr. Keeler, where there is not a record being made, as a record is being made now."

"MR. KEELER: Well, your Honor, I would like the record to show that I am not provoked by the Court. I realize that 'in controversy, the truth comes out' and I know the role of a trial lawyer, and I have no feelings of animosity or distaste or antagonism toward the Court. This is why we are here."

"THE COURT: Well, the Court's provocation is not toward you as a person, but toward the way that you have undertaken from the beginning to make the course of this lawsuit go as you apparently wanted it to go, regardless of what the Court had to say about it. (And we could get into a long history on that.) But, let it be clear, while the court reporter is taking this down, that the Court wants all of those witnesses returned to this witness room immediately and wants them to stay there until they are excused by the Court.

"This is a ruling made necessary by what you have done, and not done, in connection with this case. You have no authority, once a witness is sworn, or even under subpoena, to excuse that witness. That's the function of the Court; and the Court must take into consideration, and be assured, that the time when the jury is here, --- with all of the attendant expense to the Government of providing a jury for private litigants, --- is filled, so that we do not have these lapses. The time already lost unnecessarily in this trial could make it continue for a day or two that would otherwise be unnecessary."

"MR. KEELER: Your Honor, I will just say that

> this is part of the trial of a lawsuit, and insofar as I have had a part in any delay, I apologize to the Court. Does your Honor wish me to notify these people who are in the East to return to this court immediately? Now?"
>
> "THE COURT: Absolutely."
>
> "MR. KEELER: I will do that, your Honor; and I will object strongly to this * * * ."

In the light of counsel's apology, and in the vain hope that the Court would not be further blocked in the performance of the necessary judicial duties in the conduct of the lawsuit, I decided to take no summary action against Mr. Keeler at that time, lest same work some prejudice to the lawsuit of his client.

II

Among the other deterrents Mr. Keeler placed in the way of my performance of my judicial duties was his failure to obey orders and instructions in the matter of handling the thousands of exhibits in the lawsuit. Contrary to the instructions of the Court in the notice of the first pretrial conference, neither counsel produced any exhibits at the conference. To the contrary, they proposed an alternative method of handling the exhibits, which the Court adopted as item VI of the pretrial order.

Thereunder, each counsel was ordered within a specific period to present all his exhibits to adversary counsel. The joint initialing of any such exhibit before a notary public was to constitute counsel's joint stipulation that such exhibit was authentic and admissible in evidence without further proof. All other exhibits were ordered marked "for identification only", and within five days from the offering and refusal to stipulate, counsel offering the disputed exhibit was ordered to submit a brief on the disputed questions involved to the Court for a ruling thereon in advance of the trial. It was further ordered that any party might examine and cross-examine with regard to any exhibit admitted at any time by the Court. There were amendments and supplementations of the pretrial order after a second pretrial conference of March 21, 1966.

At a further, but informal, conference on the eve of the trial, as well as many times thereafter, the Court instructed Mr. Keeler, whose exhibits would first be referred to in evidence, to present all the plaintiff's proposed exhibits for any necessary rulings by the Court in advance of offering of the exhibit. When Mr. Keeler neglected or refused to comply with these orders and instructions, Mr. Keeler was ordered not to present any exhibit to any witness which had not been either admitted into evidence by the Court or presented to the Court for a ruling.

Jurisdiction over the subject matter of this suit being invested in the judge by law, I was empowered to determine the manner and extent in which such jurisdiction should be exercised. Bradley v. Fisher (1871), 80 U. S. 335, 352, 18 Wall. 335, 20 L. Ed. 646. This included matters touching the proper and orderly conduct of the trial. Fidelity & Casualty Co. of New York v. Niemann, C. A. 8th (1911), 47 F. (2d) 1056, 1060 [10]. It also included my exercise of discretion in intermediate proceedings which took place between the institution and the trial of this suit. Ex Parte Bradstreet (1834), 33 U. S. 586, 590, 8 Pet. 588, 8 L. Ed. 1054. Thus, it was improper for Mr. Keeler to repeatedly voice objections to evidence and procedures to which he had already objected, Union Electric Light & Power Co. v. Snyder Estate Co.,

C. C. A. Mo. (1931), 49 F. (2d) 681, certiorari denied (1931).

Yet, despite this, and despite the fact that these authorities were invited to Mr. Keeler's attnetion in a completely off the record discussion during the trial, the following are but a few such incidents in the progress of the trial:

> "MR. KEELER: * * * I want to offer this [exhibit] in evidence, probably today * * *. * * * [W]e have many others coming along later * * *."
>
> "THE COURT: Well, now, we have consumed almost a half-hour of our time this morning, and the Court has requested that these disputed exhibits for the plaintiff be brought over here, so the Court can rule on them in advance, and we will not be taking our jury-time in discussing these things." (Tr. p. 97.)

(In chambers:)

"THE COURT: I wanted you in here to tell you this, before court opens, as I do not think it should be in the presence of the jury: I will not accept any more exhibits that have not been presented to and examined by opposing counsel. The Court wants you gentlemen to understand that I expect my pretrial order and rulings to be observed without my having to exercise my vocal chords. * * * "

"MR. KEELER: I understand, your Honor." (Tr. p. 244-A.)

"MR. HEADLEY: * * * [W]hile this appears as 'marked for identification', the objection has since been withdrawn and counsel are in agreement."

"THE COURT: All right."

(Document handed to witness.)

"MR. KEELER: May I see the exhibit?"

"MR. HEADLEY! I am sorry, Bob, I apologize."

(Document handed to Mr. Keeler.)

"THE COURT: Let's not take a lot of time passing exhibits among counsel."

"MR. KEELER: I am sorry, your Honor; this is our exhibit. I handed it to [associate] counsel to initial."

"THE COURT: It is an exhibit of the Court now. Anybody can use it."

(Document handed to witness.) (Tr. p. 288.)

"MR. KEELER: * * * I would like to note my objection for the record to the admission of defendants' exhibits and passing them to the jury prior to the defendants' case."

"THE COURT: All right. Would you like to have this as a continuing objection?"

"MR. KEELER: Yes, sir."

"THE COURT: All right." (Tr. p. 293.

"MR. KEELER: * * * I object to that procedure; I want the record to reflect it."

"THE COURT: Your objection is noted; it has been noted several times." (Tr. p. 886.)

"MR. KEELER: May the record, please, note my objection to this procedure once again." (Tr. p. 1025.)

"THE COURT: Mr. Keeler, you have a continuing objection."

"MR. KEELER: Thank you, your Honor."

"THE COURT: I don't want to sit here and hear this objection repeated time after time."

"MR. KEELER: Thank you. I am glad to know I have a continuing objection." (Tr. p. 1026.)

(In bench conference:)

"MR. KEELER: I have a continuing objection to the offering of exhibits by the defendants during (Tr. p. 1273) the plaintiff's case and to the submission of these exhibits to the jury while the plaintiff's case is in progress; and rather than objecting each time this is done, by stipulation, approved by the Court, I have a standing, continuing objection to this procedure."

"THE COURT: All right, continue * * * ." (Tr. p. 1274.)

"MR. KEELER: Your Honor, am I clear that I have a standing objection to this procedure on the matter of these depositions?"

"THE COURT: Well, I think you've brought it up every day for eight days; I should think so."

"MR. KEELER: I would prefer to have a 'sitting' objection, though."

"THE COURT: Yes, you do have a standing objection to the procedure the Court is following in reading of the discovery depositions. Is that what you want?"

"MR. KEELER: Yes, your Honor; that's all I want to be sure about." (Tr. p. 1362.)

"MR. KEELER: * * * [M]ay I ask that exhibit 24i be, at least, kept with the other exhibits in this case?"

"THE COURT: I beg your pardon?

"MR. KEELER: As a proffer, exhibit 24i ----"

"THE COURT: All of the exhibits are kept together by the clerk." (Tr. p. 1555.)

(In a bench conference:)

"MR. KEELER: * * * Your Honor has a few exhibits bearing on this * * * ."

"THE COURT: * * * [T]hese disputed exhibits were handed to me --- when was it?"

"MR. KEELER: Friday morning."

"THE COURT: The Court has moved on them just as rapidly as the Court could. The Court had been asking for those exhibits for two weeks before Friday morning -- a little bit more than two weeks --- ; and I think we did right well to get as many done as we did. * * * " (Tr. p. 1665.)

(In bench conference:)

"THE COURT: * * * [Y]ou can conclude with this witness and Mr. Headley can start his cross-examination; and if the Court admits this exhibit that you are talking about, I will let you go back to that, as if it were on direct."

"MR. KEELER: All right."

" THE COURT: But, right now, I don't see the materiality of it."

"MR. KEELER: * * * I have no further questions, and I don't like to 'just mark time'."

"THE COURT: The Court doesn't want you to 'just mark time'." (Tr. p. 1711.)

"MR. KEELER: I don't want to."

"THE COURT: Don't 'just mark time'; the Court instructs you not to. Is that what you are doing now, 'just marking time'?"

"MR. KEELER: No, I am not, Judge. * * * I will abandon that.

* * * Your Honor, there are some other exhibits in addition to that one."

"THE COURT: I want it understood that the reason these were not ruled on in advance of the trial is because the instructions of the Court were not followed, even after the trial started."

"MR. KEELER: Your Honor, this is my problem, perhaps the biggest problem I have ever had in a case, is to organize this trial; and I have never done it in this manner. I am just used to offering it and having it admitted or excluded as I go along. And, this is my fault, I am just not used to it, and

I work (Tr. p. 1712) with these exhibits every day; and that's the problem."

"THE COURT: All right; let's go back to the case."

(In open court:)

"MR. KEELER: * * * I have no further questions of this witness * * * ."

"THE COURT: Cross-examine."

"MR. HEADLEY: * * * [W]e have no cross-examination of this witness."

"THE COURT: All right."

"THE COURT: Call your next witness."

"MR. KEELER: May I approach the bench, your Honor?"

(At bench conference:)

"MR. KEELER: " * * * I am unable to move forward because of an exhibit * * * . * * * I don't have any (Tr. p. 1713) more questions to ask * * * ."

* * * * *

"THE COURT: I cannot understand it; I just cannot understand it. We have been through this now ---"

"MR. KEELER: Your Honor, I thought I was going on ---"

"THE COURT: I have put unusual rulings on you because you will not cooperate with the Court; and the Court is getting tired of it, Mr. Keeler, tired of it; and the Court is going to take some action, I will tell you. * * * "

"MR. KEELER: Well, I though we were going into tomorrow."

"THE COURT: Well, don't 'just think'; just get these witnesses here." (Tr. p. 1714.)

"MR. HEADLEY: * * * An exhibit that has been endorsed by both counsel is an exhibit, is it not, and is deemed admitted as of that time?"

"THE COURT: That's true."

"MR. HEADLEY: No formal introduction is necessary?"

"THE COURT: That's right; if you gentlemen have initialed it, it is an exhibit in this case." (Tr. p. 3336.)

"MR. KEELER: Is the Court's ruling on the face of the exhibit?"

"THE COURT: This is an admitted exhibit, and you can check with the clerk all you want to; but it is being passed to the jury now."

"MR. KEELER: I am sorry; I am trying to protect my client's rights, and I think I have a right to see an exhibit before it is passed to the jury."

"THE COURT: No, you don't have any such right."

"MR. KEELER: I don't know what the ruling of the Court on the exhibit is."

"THE COURT: The Court is telling you that the Court has admitted it."

"MR. KEELER: I don't know if you know what the ruling on the exhibit is."

"THE COURT: Don't worry about that; you take care of Mr. Keeler, and the Court will try to take care of the Court." (Tr. p. 3426.)

"MR. HEADLEY: I will ask counsel for plaintiff to produce plaintiff's exhibit 790."

"THE COURT: I thought all of these --- are these exhibits that have been admitted?"

"MR. HEADLEY: Yes, they have been initialed by both counsel * * * ."

* * * * * *

"THE COURT: Every exhibit that has been admitted, either by initialing of counsel, or by ruling of the Court, is supposed to be in the hands of the clerk of this Court. Now, how can counsel for the plaintiff produce this?"

"MR. HEADLEY: Because they are in his possession, your Honor. We asked for them yesterday afternoon."

"THE COURT: All right; the Court has ordered all

(Tr. p. 3493) parties to this suit to comply with the previous instructions of the Court and turn over to the clerk every exhibit which has been admitted by the Court by either method mentioned." (Tr. p. 3494.)

* * * * *

"MR. KEELER: Your Honor, the confusion is this: these were among certain exhibits which were labeled as rebuttal, and they are impeachment exhibits; and these particular exhibits that Mr. Headley has reference to were in that category and were furnished, as following your Honor's ruling. There are other exhibits which have not been submitted * * * . As a result of furnishing, they were initialed, and we still have them."

"THE COURT: They should be turned over to the clerk when it [sic] is admitted. Perhaps the confusion arises from the fact that the Court at the pretrial conference has the exhibits marked and then returns them to counsel for trial preparation purposes. But once the trial (Tr. p. 3494) is started, these exhibits are in the custody of the clerk of the

Court; and that's why the Court brought this matter up yesterday."

* * * * *

"MR. KEELER: Then, these exhibits are not being considered at this time, and being produced as --- they are really no longer rebuttal or impeachment exhibits."

"THE COURT: Well, however you may view them, that's up to you; but they are exhibits in this case. * * * "

* * * * *

"MR. KEELER: Your Honor, I wish to have an objection to this procedure."

"THE COURT: All right; the objection is noted and overruled." (Tr. p. 3495.)

"MR. KEELER: Your Honor, may I have a standing objection to this line of interrogation? * * * "

"THE COURT: Yes, you have that as a matter of law."

"MR. KEELER: Thank you, your Honor."

"THE COURT: You made an objection to a line of questioning, and that objection continues." (Tr. p. 3715.)

"MR. KEELER: Your Honor, I object to the form (Tr. p. 3663) of interrogation, for the reason that the way this exhibit is being used, I --- why can't Mr. Headley ask him the question?"

"THE COURT: Objection overruled; I think he has got [sic] a right to do it this way."

"MR. KEELER: I mention this, because we are going into another page of this document, and your Honor said that the excerpt should not be read or passed to the jury until it is admitted by the Court."

"THE COURT: It is admitted, is it not?"

"MR. HEADLEY: Yes, sir."

"MR. KEELER: Well, I have an objection, your Honor, to this procedure."

"THE COURT: The objection is noted and overruled." (Tr. p. 3664.)

"MR. KEELER: * * * [M]ay we have a hearing or conference with the Court tomorrow on the matter of these exhibits?"

"THE COURT: What is there to discuss about exhibits?"

"MR. KEELER: * * * The matter of the exhibits that your Honor has ruled (Tr. p. 3766) on for impeachment purposes, I would like to review."

"THE COURT: Review for what?"

"MR. KEELER: We have not had an opportunity to do this, and we would like the opportunity to do so."

"THE COURT: I can't understand. For what purpose do you wish to review them?"

* * * * *

"MR. KEELER: Mr. Wood [associate counsel] suggests that I have not made myself clear, in that I have no intention of calling any rebuttal witnesses, but I may well have the intention of putting in some rebuttal exhibits, your Honor."

"THE COURT: Ones that have been admitted? You may put them in; they are already 'in'. Anything that has been admitted is 'in'."

"MR. KEELER: And there may be some more rebuttal exhibits in view of the turn that we have had, and for this I request time."

"THE COURT: You mean exhibits that you would now offer?"

"MR. KEELER: Yes, your Honor."

"THE COURT: Well, the Court would not receive them."

"MR. KEELER: Well, I would request a chance to (Tr. p. 3767) review these exhibits and review the exhibits that have been marked by the Court."

"THE COURT: I am going to consider the case closed as far as the submission of evidence is concerned, and if you come up with any exhibits that have been admitted by the Court and have not been read to the jury --- "

* * * * *

"MR. KEELER: I have * * * [an exhibit] * * * that I would expect to offer on the matter of the testimony that was read this morning."

"THE COURT: Has it been admitted?"

"MR. KEELER: It has been admitted for the purpose of impeachment."

"THE COURT: Well, that is proper rebuttal." (Tr. p. 3768.)

"MR. KEELER: Would you maybe look forward to a conference with the Court tomorrow or on Saturday with respect to the exhibits?

"THE COURT: I don't think there is anything to confer about. I have done little else but work on exhibits since I came into this case, and I am through working on exhibits.

"Now, if there is something that has been omitted here that is proper rebuttal or impeachment, that should be admitted, the Court will consider that individual problem at the time it is presented."

"MR. KEELER: Then, may we make a submission tomorrow of any exhibits in that category which we would like to put before your Honor?"

"THE COURT: Mr. Keeler, it has been my experience with counsel in this case that, when I say 'yes' to (Tr. p. 3771) something like that, I get deluged. * * * I have done about all the work I am going to do on the exhibits. We have five thousand exhibits here, and very few of them have gone to this jury. The Court has passed on exhibit after exhibit, and then has had to re-pass."

"MR. KEELER: Well, this is your Honor's rule, and I am trying to abide by it. We will review the exhibits --- "

"THE COURT: Before you get away from that statement: That is not 'his Honor's rule'; this is a rule that you gentlemen proposed that the Court adopt for the trial, to accomodate a practice you gentlemen thought was better. Don't give me credit or blame for this rule. If we had done things like I wanted to do them, we wouldn't have had all these problems."

"MR. KEELER: To avoid a more stringent rule, your Honor, that suggestion was made in the light of the evidence in this case. But, let me leave with this comment: that we will bear your Honor's admonition at heart; and if we find through looking at the exhibits that there is a problem, we think we will avail ourselves of the opportunity of presenting these limited exhibits to your Honor."

"THE COURT: Let me suggest to counsel: we are now at the point where our attention ought to be directed to your presentation -- your discussion -- of the evidence with the jury and the charge of the Court as to the law.

"The Court would like very much to be able to give an accurate and complete charge of the law to the jury, and you gentlemen have an obligation to assist the Court to do that. We have had twenty-three or twenty-four days of evidence. Let's think mostly now about working on the jury * * * ." (Tr. p. 3773.)

"MR. KEELER: I object to it, your Honor."

"THE COURT: On what ground?"

"MR. KEELER: On the ground that the letter is not properly admissible in evidence, your Honor."

"MR. HEADLEY: It has been admitted by the Court."

"THE COURT: The Court has ruled on it."

"MR. KEELER: Note my objection, please; this is completely hearsay, your Honor, and I submit it is highly erroneous to let the jury see it. The man who wrote the letter should be ------- "

"THE COURT: Just sit down!" (Tr. p. 4351.)

"MR. KEELER: I have an objection to that too, your Honor."

"THE COURT: [Do] You understand the Court has ruled on these previously?"

"MR. KEELER: I understand the Court has ruled, and I want my objection to the ruling to be on the record in this case."

"THE COURT: [Do] You understand that the law gives you an automatic objection, and it is not necessary for you to continue to make objection?

"MR. KEELER: Yes, sir. * * * ." (Tr. p. 4352.)

"MR. KEELER: * * * The purpose of my request is, your Honor, to review the matter of exhibits. It is not to review the matter of rebuttal testimony."

"THE COURT: Do you, then, announce that so far as further testimony is concerned, you rest?"

"MR. KEELER: Yes, your Honor."

"THE COURT: All right."

"MR. KEELER: But, with the one exception of the exhibits; I would like to review them."

"THE COURT: All of the exhibits that have been admitted are supposed now to be in the hands of the clerk. If they are not, the Court wants that done by five o'clock this afternoon. * * * " (Tr. p. 3754.)

"MR. KEELER: * * * I strongly object to this evidence's going in."

"THE COURT: For a hundred years the law has been that you have an automatic, continuing objection."

"MR. KEELER: Are you going to close me off?"

"THE COURT: I stated: 'you have your objection!'" (Tr. p. 4353.)

"THE COURT: Pass them to the jury."

"MR. KEELER: I ask that the record show my (Tr. p. 4353) objection to them." (Tr. p. 4354.)

III

Only one more particular will be mentioned from among the multitude of apparently contemptuous acts which Mr. Keeler committed in connection with this trial, viz., in a pleading while the trial was in progress, Mr. Keeler included the statement that there was then question whether the plaintiff was receiving a fair trial. Unfortunately, this statement found its way into the public press.

Any doubt that the plaintiff was receiving a fair trial could be accounted only to the attitude and conduct of Mr. Keeler toward the presiding judge. The Court discussed this possibility privately with Mr. Keeler in the intended interests of his client.

The further fact that Mr. Keeler's client was awarded a jury verdict for $240,000 in compensatory and $95,000 in punitive damages, in addition to other relief granted by the trial judge, precludes any argument as to whether the plaintiff received a fair trial.

I am not advised whether Mr. Keeler should receive a reprimand, be otherwise punished, or have his conduct go unnoticed. Therefore, I disqualify myself from such a consideration and direct the clerk to invite the attention of the chief judge of the Southern District of Ohio to the filing of this memorandum and certificate.

FILE:

United States District Judge
by designation

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CERTIFIED COPY

ORDER GRANTING SANCTIONS

AGAINST PITTSBURGH NATIONAL BANK

RECEIVED
MAY 2 9 1979

ENTERED
May 25 '79
[illegible] JUDGES
CINCINNATI, OHIO

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN THE MATTER OF

SCIOTO PARK, LTD.
A Limited Partnership

SCIOTO PARK, LTD.

Debtor, Counter-claimant

vs.

PITTSBURGH NATIONAL BANK

Claimant,
Counterclaim-Defendant

In Proceedings for an Arrangement Under Chapter XII

No. B-1-75-2321

ORDER GRANTING SANCTIONS AGAINST PITTSBURGH NATIONAL BANK

At Cincinnati, in said District, on May 25, 1979:

On June 17, 1977 the debtor herein filed a Motion for Sanctions, Counsel Fees and Expenses as set forth therein. Since that date there have been mesne motions, memoranda and hearings, all culminating by the filing on March 14, 1979 of proposed findings of fact and conclusions of law by Pittsburgh National Bank (hereinafter PNB) and the debtor.

Some preliminary observations are in order. Throughout these proceedings from their inception, PNB has been practically 100% resistful -- to everything -- even things for its own good. It is a constant objector and appealer, thus imposing burdensome expense on the debtor. That course of conduct, however, is its legal right, and not subject to review by the Court.

However, in a situation in which PNB exhibits unprofessional detestable conduct toward an officer of this court, something has to be done.

There are several thrusts to the debtor's request for sanctions -- failure of officers to appear for depositions, editing of bank records which the court ordered made available for discovery, and the "lawyer watch", "go get a judge" incident in Pittsburgh on May 9 and 10, 1977.

As to the failure to appear for depositions and the screening of records, there may be some reasons which PNB can advance that would move this court not to impose sanctions -- but there is no excuse for the abominable incident of May 9 and 10, 1977.

The utter contemptible way in which the PNB handled the discovery proceeding ordered by this Court is incredible -- a guard, harassment, interference, hindrance, complete uncooperation. It might be styled civil obstruction of justice.

Such conduct this Court cannot condone and must censure.

To go into any of the nasty details at this time would serve no useful purpose.

Suffice to say counsel of the debtor may submit an application for fees and expenses in connection with the Pittsburgh discovery proceeding, file it with this Court, after which, upon notice to PNB, there will be a hearing and the Court will impose monetary sanctions against Pittsburgh National Bank.

IT IS SO ORDERED.

L C Gartner
Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
I, Arnold W. Malech, Clerk of the Bankruptcy Court, certify this instrument as a true and verbatim copy of the original on file in this Court.
DATED: December 27, 1982
Clerk of the Bankruptcy Court

By:
Deputy Clerk

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PORTER, WRIGHT,
MORRIS & ARTHUR
ATTORNEYS AT LAW
301 EAST FOURTH STREET, CINCINNATI, OHIO 45202
TELEPHONE (513) 421-6200

COLUMBUS OFFICE:
37 WEST BROAD STREET
COLUMBUS, OHIO 43215
TELEPHONE (614) 227-2000

DISTRICT OF COLUMBIA OFFICE:
1133 15TH STREET, N.W.
WASHINGTON, D.C. [illegible]
TELEPHONE (202) 833-[illegible]

JAY A. ROSENBERG

September 21, 1982

William T. Coleman, Jr., Esq.
O'Melveny & Myers
1800 M Street, N.W.
Suite 500 South
Washington, D.C. 20036

Re: Sherman E. Unger

Dear Mr. Coleman:

Please find accompanying this letter copies of documents, explanatory memos and indices which I previously submitted to the U. S. Attorney for the Southern District of Ohio. After you have had an opportunity to review these enclosures, please feel free to contact me if you think it appropriate.

Sincerely,

Jay A. Rosenberg

JAR/vad
Enclosures

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Honorable Sherman Unger,
General Counsel,
Department of Commerce
5870 Department of Commerce
Washington, D.C. 20230

Dear Sherman,

Enclosed please find my affidavit per our recent telephone conversations. I trust that the same is satisfactory and will aid in ending these grossly unfair allegations.

If I may be of any futher assistance please do not hesitate to call me.

Best regards.

Very Truly Yours,

Barney

Bernard J. Gilday, Jr.
Administrative Law Judge

jld

AFFIDAVIT

State of Ohio

Montgomery County

Bernard J. Gilday, Jr, being first duly cautioned and sworn, deposes and says:

1. From August, 1979 until May 25, 1981 he was an Assistant United States Attorney and Chief of Special Prosecutions, Southern District of Ohio. That, thereafter, he served as Chief, Major Crimes Section, Office of United States Attorney, Southern District of Florida. That, since February 23, 1982, he has been an Administrative Law Judge, Office of Hearings and Appeals, Social Security Administration, and is currently assigned to the Dayton, Ohio office.

2. As Chief of Special Prosecutions, Southern District of Ohio,

affiant personally conducted and directed an investigation of an alleged bankruptcy fraud involving those organizations known as Hillcrest Properties and Unit Inc. This investigation also covered a specific complaint that Attorney Sherman Unger, Counsel for a party or parties involved in the bankruptcy action, may have violated a conflict of interest statute and had caused to be filed with the Bankruptcy Court an allegedly postdated or false affidavit.

3. Affiant further states that he personally reviewed and analyzed every pleading and document filed with the Bankruptcy Court and that he also studied every record, writing and instrument presented to him by Attorney J.A. Rosenburg, the complaining party. Additionally, affiant, on numerous occasions, conferred with Special Agent John Ryan, Federal Bureau of Investigation, who interviewed all available witnesses, save and except Judge Leonard C. Gartner, United States Bankruptcy Court, Cincinnati, Ohio with whom this affiant discussed in great detail, the allegations of possible Federal Law violation.

4. Affiant further states that Judge Gartner most emphatically stated to him that there was no impropriety involved in this proceeding. Additionally, Judge Gartner stated that the action before him was hotly contested and that Attorney Rosenburg continually complained of unfair treatment and preference being shown to Attorney Unger. That Attorney Unger was a formidable adversary who overwhelmed his opposition.

5. Affiant further states that this investigation was given a high priority and was completed in approximately thirty (30) days. That it was promptly concluded by this affiant, United States Attorney James C. Cissell and Special Agent John Ryan that the complaints of Attorney Rosenburg were meritless, without foundation and were not and could not be substantiated. That nothing was ever presented to a Federal Grand Jury, prosecution was declined and the matter file was closed.

6. Affiant finally states that, at no time, did he discuss any of the allegations with Attorney Sherman Unger.

7. And further affiant sayeth not.

Bernard J Gilday Jr

Bernard J. Gilday, Jr.

Sworn to and subscribed in my presence this 6th day of November, 1982.

Notary Public

JOHN A. CERVAY Attorney at Law
Notary Public, State of Ohio
My Commission has no expiration date.
Section 147.03 O. R. C.

Supplemental Affidavit

State of Ohio

Montgomery County

Bernard J. Gilday, Jr., being first duly cautioned and sworn, deposes and says that:

1. At the time when the allegations of fraud, falsification and conflict of interest in the bankruptcy proceeding involving Hillcrest Properties and Unit Inc. were presented to him, Attorney J.A. Rosenburg stated to this affiant that he was responding to the request and direction of his client, a Pittsburg, Pennsylvania banking institution, which was a party to the action in bankruptcy.

2. Attorney J.D. Rosenburg additionally stated to this affiant that his client believed that federal laws had been violated and that the facts and evidence mandated an investigation.

And further affiant sayeth not

Bernard J. Gilday, Jr.

Bernard J. Gilday, Jr.

Sworn to before me and subscribed in my presence this 11th day of November, 1982.

MICHAEL G. KOHN, Attorney at Law
NOTARY PUBLIC - STATE OF OHIO
My Commission has no expiration
date. Section 147.03 O.R.C.

Notary Public

23

GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

October 13, 1983

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Attention: Robert J. Short

Dear Mr. Chairman:

In re: Justice Moore's Testimony of October 5, 1983

In response to questions from Senator Specter, Justice Moore says, at the top of page 151, "He filed an affidavit which he never withdrew or corrected, despite the fact that I called it to his attention." At the top of page 152, Justice Moore says, "However, on the morning, Mr. Kohn came to my office before the hearing, and he said he was not going to correct the affidavit but merely, after speaking to Mr. Unger further, was going to say he would not dispute my affidavit although he, Mr. Unger, had no recollection now whatsoever of my February letter." Mr. Kohn disputes that statement and is willing to file an affidavit or testify accordingly.

At the bottom of page 155 and the top of page 156, Justice Moore quotes from Finding 6 of Judge Walter Stapleton's Findings of Fact and Conclusions of Law of February 8, 1980, which provides in part, ". . . In a previous letter dated February 23, 1978, Moore had had occasion to advise Unger, Unit's lead counsel, of the fact of Elzufon's involvement with Unit's affairs and of his move to the Tybout firm. (Emphasis supplied.) Justice Moore had a copy of the February 23 letter with him when he testified and knew or should have known full well that the Judge was in error and that reference in the February 23, 1978 letter to Tybout and Elzufon made no reference to Elzufon's involvement with Unit's affairs. Justice Moore should have so advised the Committee. A fair reading of the February 23, 1978 letter, a copy of which is attached, will clearly establish that fact.

On page 158, Justice Moore, in responding to a question from Senator Metzenbaum, states, "Mr. Kohn appeared, and his position was -- which was contrary to what he had told me earlier and which appears in my affidavit supporting my motion to withdraw -- but his position then was that Mr. Unger had no recollection at that stage of his prior communication with me, but that he would not dispute it. That is what they told the Judge."

We now have been able to acquire a transcript of the hearing on February 4, 1980 before Judge Stapleton -- the original of which has been sent directly to Steve Markman of Senator Hatch's staff -- in which Mr. Kohn states on page 2, "I was able to catch Mr. Unger as he changed planes in Miami, I believe -- I am still not sure what city it was -- and related the conversation to him then between Mr. Moore and myself."

"Mr. Unger stated to me first that he certainly recalled the letter, the letter was a personal matter, it was residing in his locked file, and he has never made the contents of that letter known to anybody at the office or to Unit or to anybody else."

"Second, that he had no reason to doubt Mr. Moore's assertion that a certain paragraph contained therein was true and correct and basically that paragraph had the -- I am trying to phrase this properly because I really don't wish to be in a position of waiving an attorney-client confidence -- but it was basically conveying to Mr. Unger, at the time the letter was written, knowledge of Mr. Tybout's presence as a lawyer in the Wilmington community and the fact that Mr. Elzufon was associated with his firm."

"This letter was written February 23 of 1978. So six months prior to the Trustee's application to appoint Mr. Tybout . . . "

"To the extent that Mr. Unger's affidavit leaves the impression that he was never made aware prior to the date of the appointment of Mr. Tybout, that impression is incorect. Mr. Unger did state at the time he dictated his affidavit that he still had no recollection of the letter written by Mr. Moore and that the connection became clear only when I called him and specifically referred to a letter of that date, and while he said that he could not be exactly sure that Mr. Tybout was contained in there, he certainly had no reason to doubt Mr. Moore's assertion and that he believed it to be true, and that I should appear before this Court and correct any misinterpretation which was contained in his affidavit."

The statement of Mr. Kohn on page 2 that the February 23, 1978 letter by Mr. Moore conveyed to Mr. Unger, ". . . at the time the letter was written, knowledge of Mr. Tybout's presence as a lawyer in the Wilmington community and the fact that Mr. Elzufon was associated with his firm", seems clear. The statement on page 3 by Mr. Kohn, "To the extent that Mr. Unger's affidavit leaves the impression that he was never made aware prior to the date of the appointment of Mr. Tybout, that impression is incorrect . . . and that I should appear before this Court and correct any misinterpretation which was contained in his affidavit", clearly is in contradiction with Justice Moore's testimony on this point.

Senator Specter's questions at pages 46 and 47 of the October 6, 1983 transcript raised the issue of the propriety of pursuing the Motion to Disqualify after my memory was refreshed concerning the February 23, 1978 letter. Mr. Kohn addressed that issue on February 7, 1980, a copy of which is attached, in which he provided the court with citations concerning consent, waiver and latches. Although I don't believe I was back in the office by the time, even though I had knowledge of Mr. Elzufon's association, my having failed to acquire the consent of the client to waive the conflict, our firm believed the issue was appropriately before the court. A short Memorandum of Law on this issue is attached hereto.

I respectfully request that this letter and the Memorandum of Law be placed in the hearing record.

Very sincerely,

Sherman E Unger

Sherman E. Unger

cc: Honorable Orrin G. Hatch
Honorable Arlen Specter
Honorable Howard Metzenbaum
Fred F. Fielding, Esq.
Jonathan C. Rose, Esq.

bcc: Stephen J. Markman
Michael G. Kohn

KOHN & HELMER
ATTORNEYS AT LAW
2820 DUBOIS TOWER
511 WALNUT STREET
CINCINNATI, OHIO 45202

TELEPHONE (513) 241-0820
TELECOPIER (513) 241-0836

MICHAEL G. KOHN*
JAMES B. HELMER, JR.**
PATRICIA A. HINDEL**
ANN LUGBILL

*ALSO D.C., FLA., N.J. BARS
**ALSO D.C. BAR

WASHINGTON OFFICE

888 SIXTEENTH STREET, N.W.
WASHINGTON, D.C. 20006

TELEPHONE (202) 835-8087

REPLY TO Cincinnati, Ohio

October 12, 1983

Stephen J. Markman
Chief Counsel
Senate Judicary Committee
143 Dirksen Building, Room 143
Washington, D.C. 20510

FEDERAL EXPRESS

Dear Steve:

I enclose herewith the copy of a letter I wrote on February 7, 1980 to United States District Judge Walker K. Stapleton regarding Unit's Motion for Disqualification. The letter was written in response to an Order of the Court, read to me by telephone, which directed all further submissions on this Motion to be submitted to the Court by telephone.

In view of our duty to go forward at our client's request, I telephoned Judge Stapleton's law clerk and presented to her our further arguments concerning consent, waiver and latches. The enclosed letter is a confirmation of that telephone conversation and refers to the cases cited over the telephone on those issues in support of our position that the client had not consented, or waived his right to consent.

If you have any questions regarding this matter, please do not hesitate to contact me.

Very truly yours,

Michael G. Kohn

MGK/mju

Enclosure

cc: Sherman E. Unger

SHERMAN E. UNGER
ATTORNEY AT LAW
2620 DUBOIS TOWER
511 WALNUT STREET
CINCINNATI, OHIO 45202
TELEPHONE (513) 241-0820

SHERMAN E. UNGER
MICHAEL D. KOHN

WASHINGTON OFFICE
1776 F STREET, N.W.
WASHINGTON, D.C. 20006
TELEPHONE [illegible]

REPLY TO: Cincinnati

February 7, 1980

Honorable Walter K. Stapleton
U.S. District Court
Federal Building
844 King Street
Wilmington, Delaware 19801

Re: Freidco v. Farmers Bank
Case 76-149

Dear Judge Stapleton:

This will confirm and amplify the comments I made to Ms. Wheatley by telephone regarding Unit's Motion for Disqualification.

Through the cooperation of Mr. Bell, I was able to receive a telecopy of Mr. Tybout's letter and Affidavit and the Affidavit of Mr. Elzufon. Mr. Bell read to me by telephone the Affidavit and letter delivered to you by Peter Walsh later in the day.

With respect to Mr. Tybout's Affidavit, I advised your law clerk that insofar as it states that Mr. Unger was aware of Mr. Elzufon's presence in Mr. Tybout's office at the time that his appointment was pending before the Bankruptcy Judge, I was unable to comment as Mr. Unger could not be reached and I would have to rely on the comments I had made in open court. Those comments were made following a conversation with Mr. Unger during which I reported to him the substance of Mr. Moore's earlier conversation with me. That conversation related solely to Mr. Moore's letter of February 23, 1978.

With respect to the Affidavit of Mr. Walsh, I advised your law clerk that I had not been aware of the matter involving Mr. Wales until Mr. Bell had read me the Affidavit over the telephone. Mr. Bell advised me that this matter occurred approximately 2 months ago and that he (Mr. Bell) had left the decision up to Mr. Wales.

I provided your law clerk with the following citations, of which *two* were cited in Unit's brief, filed in support of its Motion for Disqualification:

> *Emle Industries, Inc. v. Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973) (cited in our brief);
>
> *Westinghouse Electric Corp. v. Gulf Oil Corp.*, 588 F.2d 221 (7th Cir. 1978);
>
> *IBM Corp. v. Levin*, 579 F.2d 271 (3d Cir. 1978) (cited in our brief);
>
> *Government of India v. Cook Industries, Inc.*, 422 F.Supp. 1057 (S.D.N.Y. 1976);
>
> *Koehring Co. v. Manitowoc Co.*, 418 F.Supp. 1133 (E.D. Wisc. 1976).

As I did not understand your Honor's letter and Order, read to me by your secretary, to call for comment on the cases cited by Mr. Tybout in his letter, I did not offer such comment to Ms. Wheatley. I did, however, advise her that the *Government of India* case had been affirmed by the Second Circuit without reference to the issue under consideration by this Court.

Very truly yours,

Michael G. Kohn

MGK/pac
cc: Max S. Bell
F. Alton Tybout
Peter J. Walsh
Thomas G. Hughes
W.S. Anderson, Jr. - Clerk

Law Offices
Connolly, Bove & Lodge
Farmers Bank Building
Wilmington, Delaware 19899
Cable Address Artcon
Area Code 302-658-9141
(Telex 83-5477)
P. O. Box 2207

Arthur G. Connolly
Januar D. Bove, Jr.
[illegible]
Thomas S. Lodge
Jacob C. Reller
Albert F. Bower
Nicholas L. [illegible], Jr. (D.C. Bar)
Richard E. Cornwell (D.C. Bar)
James M. Mulligan, Jr.
Arthur G. Connolly, Jr.
Rudolf E. Hutz
F. L. Peter Stone
Andrew G. T. Moore, II
Harold Pezzner
John B. Fairchild (Mich. Bar)
Richard M. Beck (D.C. Bar)

Werner H. Hutz
1908-1970
Paul E. Crawford
B. Bernhard Ableman
John R. Bowman
Lewis H. Wilson (Ill. Bar)
Stanley C. Macel III
J. R. Julian
James B. Green
N. Richard Powers
Peggy L. Ableman
Henry E. Gallagher, Jr.
Richard T. Foster (Va. Bar)
Reginald J. Sutat (Va. Bar)

February 23, 1978 ✓

Sherman E. Unger, Esquire
2724 DuBois Tower
511 Walnut Street
Cincinnati, Ohio 45202

Re: Libel And Malicious Prosecution
Of Sherman E. Unger

Dear Sherman:

You have requested my legal advice with respect to the so-called "Debtor's Amendment To Its Statements And Schedules", signed by Paul P. Welsh, Esquire, on behalf of the firm of Morris, Nichols, Arsht & Tunnell, and by Harry B. Tingle as a purported "successor liquidating trustee" of Freidco. This document was personally served on us in the afternoon of Wednesday, February 22, 1978. I understand that you received a copy today by mail from Mr. Welsh at your offices in Cincinnati. The document has also been filed, as a public record, in the United States District Court for the District of Delaware.

My immediate impression of the document when I first read it, and my continued impression after thinking about it overnight, is that it is a highly unprofessional and irresponsible attempt by Mr. Welsh to achieve an end for his clients which is not justified by the facts in this case or the law. In this respect, I am divorcing consideration of the claims which Hickman and Tingle have made against Unit during the course of this proceeding and the right of their counsel to make fair comment thereon in his role as an advocate. However, the purported Amendment to the Debtor's Statement and Schedules now includes a direct attack upon Unit's counsel, and in my opinion, based on the facts known by me to date after full discovery by all parties on the issue on the appointment of a trustee, the allegations and statements signed under oath by Mr. Tingle, as prepared, drafted and signed by Paul Welsh exceed the bounds of fair comment and privilege. Specifically, I refer to the following, which appears under the heading "Supplement To Schedule B-2 Part Q":

> "The debtor has unliquidated claims against the following persons, of the following type and estimated amount:
>
> "(a) Claims against Unit, Inc. for embezzlement and conversion of the debtor's funds, for wrongful encumbrance of the debtor's property to secure its private obligations, for malicious and negligent mismanagement of debtor's affairs, including without limitation mismanagement of proceedings conducted purportedly on debtor's behalf, for breach of fiduciary obligations,

> for conversion, and for fraud. The value of these claims has not been determined, but they are believed to exceed in value all of Unit's claimed interests in debtor and debtor's estate.
>
> "(b) Claims against Sherman E. Unger, Esquire, for inducing Unit's above described breaches of its obligations to debtor, for participation in all of Unit's said wrongs as a joint tort feaser, for malicious and negligent mismanagement of debtor's affairs, including without limitation mismanagement of proceedings conducted purportedly on debtor's behalf, for breach of fiduciary obligations, for conversion, and for fraud. The value of these claims has not been determined, but they are believed to exceed in value all of Mr. Unger's claimed interests in debtor and debtor's estate." (Emphasis added).

In essence, subparagraph (b) charges you with a knowing participation in a crime, or crimes, apparently for no other reason than your participation in this matter as counsel for Unit and secondarily, because of the fact that you too are a limited partner in Freidco.

If these allegations against you appeared without the benefit of knowing that Hickman, Tingle and Welsh attempted to include in the aborted settlement a requirement that you relinquish your limited partnership interest in Freidco, I would still consider the allegations beyond the protection of any privilege. However, knowing that Welsh negotiated directly with you in an effort to relinquish your participation in Freidco, it may be that these statements are not only unprivileged and libelous, but made for a malicious purpose and to achieve an end which is not warranted by any relief that Freidco or its other partners could rightfully seek against you for any breaches of alleged fiduciary obligations by Unit.

In the short time available to me since this document was served on us late yesterday, I have not had an opportunity to fully research the issues it may present insofar as your right to make a personal claim against Welsh, his law firm, or Harry Tingle. You should be aware that statements made in the course of judicial proceedings, bearing some relation to such proceedings, are ordinarily protected by an absolute privilege. Several cases seem to give lip service to this principle, although certain exceptions are recognized. Tatro v. Esham, Del.Super., 335 A.2d 623 (1975); Read v. Baker, 430 F.Supp. 472 (D.Del. 1977); Petty v. General Accident, Fire & Life Assurance Corp., 365 F.2d 419 (3d Cir. 1966), applying New Jersey law; Prosser, Torts, §109, p.798 (3d Ed. 1964); Restatement 2d, Torts, §586; Annotation, 38 A.L.R.3d 272.

Of course, Mr. Welsh's conduct is always subject to disciplinary action even in the face of an absolute privilege. Thus, if his allegations are false or the product of malice, he may be found guilty of Disciplinary Rule 7-102, which provides in pertinent part:

> "(A) In his representation of a client, a lawyer shall not:
>
> "(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when

> he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.
>
> "(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law."

* * *

> "(5) Knowingly make a false statement of law or fact."

* * *

> "(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."

It also would appear that if Mr. Welsh's statements are materially false, he has engaged in the type of misconduct prohibited by Disciplinary Rule 1-102:

> "(A) A lawyer shall not:
>
> "(1) Violate a Disciplinary Rule.
>
> "(2) Circumvent a Disciplinary Rule through actions of another."

* * *

> "(4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.
>
> "(5) Engage in conduct that is prejudicial to the administration of justice."

Furthermore, if you believe that you have been libeled by Mr. Welsh, you, as a lawyer, are under an absolute obligation to report the same to the necessary authorities. See Disciplinary Rule 1-103.

If the actions of Messrs. Welsh and Tingle, as well as Morris, Nichols, Arsht & Tunnell are not absolutely previleged, it would appear that you may also have a valid claim for abuse of process. That cause of action was defined in the case of Unit, Inc. v. Kentucky Fried Chicken Corporation, Del.Super., 304 A.2d 320, 331 (1973):

> "In regard to the claim for abuse of process, Prosser states that the essential elements of the tort are: (1) an ulterior purpose; and (2) a wilful act in the use of the process not proper in the regular conduct of the proceedings. In explaining these elements, Prosser notes that some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required. Merely carrying out the process to its authorized conclusion, even though with bad intentions, does not result in liability. Some form of coercion to obtain a collateral advantage,

> not properly involved in the proceeding itself, must be shown. Prosser, Law of Torts, §121 (4th Ed. 1971)."

There may also be a claim for tortious interference with your business relations as a limited partner in Freidco. Again, the opinion in Unit, Inc. v. Kentucky Fried Chicken Corporation, supra is pertinent at p.332. The court stated:

> "The applicable law as to tortious interference with business relations was recently reviewed by Chancellor Duffy in Bowl-Mar Company v. Brunswick Corporation, Del.Ch.,297 A.2d 61 (1972). At 297 A.2d 64, the court cited the Restatement of Torts, §766 (1939) which states:
>
> > '. . .One who, without privilege to do so, induces or otherwise purposely causes a third person not to
> >
> > (a) Perform a contract with another, or
> >
> > (b) Enter into or continue a business relation with another
> >
> > Is liable to the other for the harm caused thereby.'
>
> "The court at 297 A.2d 65 also cited 45 Am.Jur.2d Interference, §50 to the following effect: 'The basic elements which establish a prima facie tortious interference with a business relationship are the exitence of a valid business relation (not necessarily evidenced by an enforceable contract) or expectancy; knowledge of the relationship or expectancy or the part of the interferer; and intentional interference inducing or causing a breach or termination of the relationship or expectancy; and resultant damage to the party whose relationship or expectancy has been disrupted.'"

However, even such tortious interference may be protected by an appropriate privilege. See the Restatement of Torts, §773 (1939) and Unit, Inc. v. Kentucky Fried Chicken, supra, pp.332, 333.

You also asked me about your amenability to service of process in Delaware. Ordinarily, one who comes into this State for purposes of attending court sessions has the privilege of immunity from process. Northumberland Insurance Co. v. Wolfson, Del.Supr., 251 A.2d 194 (1969). While the Northumberland case dealt with a witness, it seems to me that its rationale is equally applicable to a nonresident attorney who is appearing on behalf of a client.

Unless your previous application for counsel fees in the Freidco bankruptcy proceeding is construed as a general appearance, I do not see how you are subject to the jurisdiction of the Bankruptcy Court for the prosecution of any claim of the type set out in the purported Amendment to the Debtor's Schedules. There is one other aspect of this matter which bears some consideration. In the recent case of Shafer v. Heitner, ___ U.S. ___, 97 S.Ct. 2569 (1977), the United States Supreme Court invalidated the application of the Delaware Sequestration Statute to those nonresidents who do not have "minimun contacts" with Delaware. This would also be true with respect to our Foreign Attachment Statute. Prior to the Heitner decision, a person suing you could have attempted to bring you into this State by seizing your interests in the Freidco partnership. Even if that was attempted in this case by some alleged showing that you had certain minimum contacts with Delaware by virtue of your limited partnership interests in the Farmers Bank Building, it seems to me that a plaintiff would have to face some rather difficult technical questions, relating to those contacts, and secondly, whether the Delaware Sequestration or Foreign Attachment Statutes can be utilized to seize one's interest in a foreign partnership.

While I have tried to outline certain aspects of Delaware law to you, I think the issues are so important that you should consider consulting other counsel, particularly because of the possibility that I may have to be a witness in the event you file suit against Welsh, his firm and Harry Tingle. One of the finest and most successful tort lawyers in this State is Alton Tybout. John Elzufon is now an associate of his firm. He would be at the top of my list if you choose to consult other counsel with respect to this matter. Alton is a widely respected, very tough, and courageous lawyer in the tort field. You could do no better if you had him on your side. You might also consider talking to either Bill Prickett or Rod Ward at Prickett, Ward, Burt & Sanders, the firm that Danny Kristol joined. They also would be at the top of my list for this type of case.

I know you are considering a complaint to the Censor Committee of the Supreme Court of Delaware concerning Paul's conduct. Andy Kirkpatrick is the Chairman of that Committee, and would naturally withdraw from any consideration or participation in such an investigation. If you decide that a complaint should be made, and this is something that must be your personal decision, I would suggest that you write to Henry Herndon, Esquire, of the firm of Morris, James, Hitchens & Williams, P. O. Box 2306, Wilmington, Delaware 19899, one of the members of the Censor Committee. Any Committee member whose firms are associated with participants in the Freidco matter would naturally recuse themselves.

I know that you are very disturbed by what has transpired. Frankly, it is one of the most vicious things that I have ever seen take place during the course of a judicial proceeding, and I am utterly appalled. I can also assure you that Paul Welsh, as well as the conduct that you and I have observed, is in no way indicative of the standards that generally prevail at the Delaware bar.

Very truly yours,

Drew

Andrew G. T. Moore, II

MEMORANDUM OF LAW

On January 16, 1980, I accompanied the chairman of a corporate client to a deposition at the law office of opposing counsel. The chairman was outraged when he learned for the first time that an attorney who had previously worked with his corporation's local counsel and my co-counsel, Mr. Moore, on the same case, was now working for opposing counsel. My client instructed me to file a motion to disqualify opposing counsel, and I did so within several days. My filing of the motion has been attacked by Mr. Moore, who refused to sign it, and withdrew as counsel after it was filed.

He believed it was improper to file the motion because he felt that we, as counsel for the corporation, had waived any conflict of interest. The issue was raised nearly a year and a half after opposing counsel had been appointed.

I. Unit's Motion to Have Trial Counsel for Friedco's Trustee Disqualified was Non-Frivolous.

The facts recited above provided a legally sound basis for a disqualification motion. Courts will disqualify a law firm if a member of the firm formerly represented an adverse party on a substantially related matter. See Government of India v. Cook Industries, Inc., 422 F.Supp. 1057 (S.D. N.Y. 1976), aff'd 569 F.2d 737 (2d Cir. 1978).

In this case, a member of opposing counsel's firm had represented the moving party in the same litigation. Mr. Moore has never contended that the basic conditions for disqualification were not present in this case. Rather, he argued that the admitted conflict had been waived by himself, myself, and my associate, Mr. Kohn. Mr. Moore's argument presumed that a lawyer can waive the client's right to object to a conflict of interest.

A conflict cannot be waived by an attorney without the consent of the client. As the Court noted in In re Yarn Processing Patent Validity Litigation, 530 F.2d 83, 89 (5th Cir. 1976), the "client may consent to the employment of the attorney by [the] adverse party." In those disqualification cases where the waiver issue is discussed, the courts examine the behavior of the former client in order to determine whether a conflict has been waived. See, e.g. Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 573 (2d Cir. 1973); IBM v. Levin, 579 F.2d 271, 281 (3d Cir. 1978); Rossworm v. Pittsburg Corning Corp., 468 F.Supp. 168, 175 (N.D. N.Y. 1979).

Assuming the facts recited by Mr. Moore in his affidavit accompanying his motion to withdraw as counsel made out an arguable claim of waiver, they cannot be said to have conclusively established waiver. Waiver is the intentional relinquishment of a known right. Matsuo Yoshida v. Liberty Mutual Ins. Co., 240 F.2d 824, 829 (9th Cir. 1957). A client whose waiver is sought must be presented with all facts relevant to the conflict, and be aware of the potential ramifications of the adverse representation. See IBM v. Levin, 579 F.2d at 282; Marchetti v. Fitzsimmons, 373 F.Supp. 637, 641 (W.D. Wisc. 1974); E.F. Hutton & Co. v. Brown, 305 F.Supp. 371, 400 (S.D. Tex. 1969) (receipt of advice about the existence and legal implication of any conflict of interest is the bare minimum predicate for a waiver of right to object to a subsequent adverse representation). In the litigation in issue here, the client was unaware that the lawyer who had represented his client was now on the other side of the litigation, until a few days prior to the filing of the disqualification motion. Mr. Moore gave no indication that he or anyone else had ever discussed the conflict with the client.

The facts asserted by Mr. Moore, and the facts as I knew them at the time I filed the motion, certainly did not conclusively establish that a waiver of the client's rights had occurred. Since doubts about disqualification should be resolved in favor of it, IBM v. Levin, 579 F.2d at 271, and since a strong showing is required to established waiver, the motion was non-frivolous. The good faith of a party, or its counsel, should not be called into question simply for filing a motion to disqualify, for "in deciding questions of professional ethics men of good will often differ in their conclusion." Fund of Funds, Ltd. v. Arthur Anderson & Co., 567 F.2d 225, 227 (2d Cir. 1977).

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

FREIDCO OF WILMINGTON,)
DELAWARE, LTD., et al.,)
)
Plaintiffs,)
)
vs.)
)
THE FARMERS BANK OF THE)
STATE OF DELAWARE,)
)
Defendant,) Civil Action No. 76-149.
)
vs.)
)
UNIT, INC.,)
)
Third-Party)
Defendant.)

- - - - -

Wilmington, Delaware
February 4, 1980

BEFORE:

THE HONORABLE WALTER K. STAPLETON, Judge,
United States District Court.

APPEARANCES

For Trustee: TYBOUT, REDFEARN, CASARINO & PELL
By: F. ALTON TYBOUT, ESQ.

For Freidco: MURDOCH & WALSH
By: PETER J. WALSH, ESQ.

CONNOLLY, BOVE & LODGE
By: ANDREW MOORE, ESQ.

For Unit: MICHAEL G. KOHN, ESQ.
(Cincinnati, Ohio)

For Farmers Bank: RICHARDS, LAYTON & FINGER
By: MAX S. BELL, ESQ.
ROBERT KATZENSTEIN, ESQ.

- - - - -

February 4, 1980
Courtroom No. 4

PRESENT: As noted.

THE COURT: Good morning, gentlemen.

I think I have four motions before me -- two from Mr. Bell, a motion to withdraw and a motion to strike something that hasn't been filed yet.

Am I wrong?

MR. BELL: I'm not aware of a motion to strike other than to strike counsel.

THE COURT: I'm sorry, I thought there was a motion filed to strike the motion to require counsel to withdraw.

MR. KOHN: I believe that's correct.

THE COURT: A motion to require counsel to withdraw was not accepted by the Clerk because it wasn't signed by a local attorney; is that right?

MR. TYBOUT: That's correct, Your Honor.

MR. KOHN: Your Honor, I believe there are three motions filed by Mr. Bell: there's the motion to dismiss the Trustee's seventh claim; there's a motion for partial summary judgment; and there's a motion for default judgment of sanctions arising from the discovery filed against Unit.

MR. BELL: That's not being presented this morning. We made no application for that to be heard. I don't consider that as before the Court this morning.

THE COURT: All right. The motion I was referring to was called a Motion to Strike Unit's Motion to Disqualify served on the parties on January 21st, 1980. I'm willing to hear anybody's suggestion as to how these matters should be taken up, but my proposal is that we hear Mr. Bell's motion, and Mr. Bell first, hear what everybody has to say about Mr. Bell's motion and then proceed to the other two.

Do you have a suggestion?

MR. KOHN: I would concur with that, Your Honor. I would just ask if Mr. Bell by his comments has indicated he is withdrawing that motion or, rather, leaving it open for decision without argument to the Court.

MR. BELL: Unless I have to, I haven't done either. I really haven't had much time to focus on that over the weekend. I'm just not asking to have it presented

THE COURT: All right.

MR. TYBOUT: I've prepared and served an affidavit; bring it to the Court's attention (handing to Court).

THE COURT: I should say that I've read Mr. Bell's memorandum and brief. I checked on Friday afternoon but the others were filed at 4:55 and I didn't pick them up so I have not yet read them.

MR. BELL: Well, Your Honor, you won't need to. I'll tell you all about it.

(Laughter)

MR. BELL: I'd like to deal first with the Motion to Dismiss the seventh cause of action.

THE COURT: I should add that I'm going to have to confine you to about 20 minutes because I have a case I've got to try this morning.

MR. BELL: Confine me or all of us?

THE COURT: You.

MR. BELL: Fine. I will try to do it in much less and save some time for reply.

THE COURT: All right.

MR. BELL: And we are coming back to see Your Honor this afternoon. I believe we still have a pretrial conference at 4:30.

On the seventh cause of action, I think it would be helpful to the Court, if you have the brief that's been filed on behalf of the Trustee in regard to this, because I'm really replying to it and I'll ask the Court to get it -- and I don't have it myself.

There are three arguments that I have to reply to and the middle one I'd like to take first, which begins on Pages 11 and 12. They have argued that they have a benefit from Section 11(e) of the Bankruptcy Act. I think they're completely mistaken as to almost every point made in this section of the brief and I would like to just briefly comment on it.

Section 11(e) is a statute that tolls the statute of limitations in certain circumstances for trustees or receivers. And what it says is once they're appointed, if a statute hasn't already expired on a cause of action, it's sort of frozen for two years. It's tolled for two years.

As the brief is written, it's proposed that after the two years the statute starts to run again. And none of the authorities cited say that at all. The authorities support exactly what you can get by reading 11(e) itself. It's very simple from the cases and the treatises, if there's a cause of action that has not expired because of the statute at the time of adjudication -- okay, now you've got to focus on time of adjudication. The brief is wrong as to that. It's not the appointment of a trustee or a receiver; it's the filing of the petition. And in this case, that was September '75, and that definition for Chapter 12 is Section 402. So the two-year period, if it were to do any good in this case, would start running in September '75 and it ran out in September '77.

Now, the Trustee would have gotten two or three months' benefit from it, but almost all the two years was used up before his appointment.

And then the statute says, if the two years doesn't do you any good, it does not override the other statute of limitations, state law or otherwise, if there's some time left in it.

So we can look at two different time periods. Let's take a cause of action that accrued immediately before the filing, say August '75. Under state law, you have three years. That expired August '78, too late for the seventh cause of action. The seventh cause of action is too late. And the two-year period doesn't help them because it began running in September '75, so it's shot.

Now, that's the latest because under the Court's umbrella, there aren't any causes of action that they're talking about that could have accrued after the bankruptcy was filed, so that the bankruptcy laws give no benefit to the Trustee and we have to look at these other things, and I just wanted to deal with that first because if it applied, we wouldn't have to argue about Rule 15(c).

Now, the first part of the brief deals with Rule 15(c) and, as I understand the rule and the authorities, it's dealing with two types of cases. The first sentence is dealing with amending a pleading against the same party and the second sentence deals with whether you can relate back when you file an amended pleading on a new party. And as I understand the Trustee's brief, he's not relying on the second sentence. He's not claiming in this case that there was some mistake, and he would have to claim mistake to get in under the second sentence, that there was some mistake when Hickman was sued instead of Farmers Bank. And if I'm mistaken, then I have to respond to that but the type of mistake being referred to in that second sentence simply hasn't been presented in this case.

Now, under the first sentence, it's clearly dealing with amending the pleading that's already in court. The only pleading for this rule is the Bank Holding Company complaints. That's what they're trying to amend and the issue is does it relate back?

If they want to rely on bankruptcy, pleading something that was pending in the Bankruptcy Court before it was transferred here, then they would, you know, file a pleading directed to amending that. They're not doing that so that the contents of these other documents don't help them. And putting in a copy of the Chancery Court Complaint doesn't help them. They're not trying to amend that. They're not proceeding in Chancery Court. The Trustee has not entered that case and so we are looking at the Bank Hold Company cause of action -- causes of action 1, 2 and 3.

Now, Rule 15(c) requires the Court to focus on conduct, transactions, occurrences. Now, it seems to me, Your Honor, that there's no way that you can look at the seventh cause of action that they're proposing and say that it's simply a restatement of the same conduct, transaction or occurrence, for several reasons.

I remind the Court that you already have commented on the divergence of the substance in comparing these causes of action. You've already said that this type of thing goes far beyond the Bank Holding Company actions. It seems to me that the Trustee's just ignoring what you've said when you made that comment and I don't think his reference to other causes of action helps him because he's not trying to amend them.

But even if the Court reconsiders that issue, the seventh cause of action raises many new issues as to different transactions and occurrences. And this agency concept has not been pleaded before, particularly in this way, because it inovlves four parties. They're trying to link the Bank as an agent for partnership, and the way you get there is you look at the relationship between the partnership and Robert Hickman and Harry Tingle individually and then the relationship between Bob and Harry with Hickman & Co. and then the relationship between Hickman and Co. and Farmers Bank.

Now, that's what they're pleading, you know. You telescope all of that. To do that, they have to show that the separate corporate existence of Hickman & Co. from Farmers Bank should be disregarded. We have not had pleadings that raised that. Even if you consider everything pleaded everywhere, even if the Court finds that it can look at the other pleadings, I find nothing that raises that issue.

In order to prevail on the seventh cause of action then, they will not only have to disregard the separate corporate existence of the Bank and Hickman & Co., but you look at a different type of transaction.

They're now alleging in regard to these amounts specified in Paragraph 53 not only that Farmers owes 10,000 for space or owes 57,000 for electricity for the sign on the roof but they are alleging something new, that there is a nondisclosure, a misdeed involved on a daily, continuing basis. In other words, it's not just that Farmers owes the money but that Farmers did something wrong in not communicating with Freidco.

You see, in Paragraph 52 they allege that the Bank was wrong by dealing with Freidco as an adverse party. All the other pleadings were in the nature of an adverse party. We have had pleadings based on the lease -- landlord/tenant, you know. They don't have a fiduciary relationship. These are people dealing with each other but they have no relationship such as is now being alleged. And they go on to allege it was wrong for the Bank to fail to disclose.

Well, now, to dispute that and that there was disclosure requires an examination of all communications throughout the time in question, from '71 to '75. And where we are prejudiced is the people involved aren't with the Bank any more. You're talking about Ed Connor, Rob Hickman, who are not longer connected with the Bank in any way. They have separate counsel. I deal with them through counsel.

For us to respond to nondisclosure and say, "Hey, there was disclosure," we had to go back and look not just at the documents and transactions that deal with do we owe the money but we looked for something entirely different. What were the communications all through the time period?

Well, it seems to me you can go through all of the allegations of the seventh cause of action and see that we are truly dealing with something that did not arise out of the conduct, transactions, occurrences as set forth in any of the pleadings, even if you look at all the pleadings because it's a different type of cause.

That's all I'm going to say at this time on the seventh cause of action. On the other issue, extension of credit, I've got to say that this is not adequately briefed to the Court.

We received an answering brief Friday afternoon at 4:00, 4:30 or something, and we received the affidavit of Mr. Dix about that time or later. It's an issue that should have the Court's attention because it's extremely important to this trial. You should have it in this context.

We have an issue under the statute as to what extension of credit means. That's not going away. The number-one question in considering that is, are you going to regard expert testimony as at all relevant?

Okay. We have offered expert testimony. Unit has offered expert testimony. In my view, although I haven't been able to file a brief, they say substantially the same thing, leaving exactly the question that we want -- that has to be answered at some time. Does this statute apply in circumstances where the Bank obviously is not trying to get more business out of a customer it's trying to collect? And in due course that has to be decided. The facts are not in dispute and the fact that the experts articulate their authorities on the issue in a somewhat different fashion does not mean that summary judgment is not appropriate right here.

We are not ultimately having a disagreement as to facts. We are having an argument about the meaning of the statute that underlies all three of the first three causes of action -- what is extension of credit in regard to that statute -- and it seems to me, Your Honor, that I don't know where we are going on the other things. It may be too late for us to adequately complete the briefing and submissions to the Court if we are going to trial next Monday. We could probably have a brief in tomorrow on it, but Sutherland, Statutory Construction, has some guidance on this and the guidance is in the areas of when you do use experts, since we have got some folks. I think the Trustee takes the position you can't consult experts. Unit takes the position that they have got an expert that disagrees with us and precludes summary judgment which I don't believe is correct because we are not having a disagreement as to the facts. We are having a disagreement as to the statute. But Sutherland has a lot of help in this area as to when you use the expert and also on what attitude you take in addressing the statute. Is it penal? And, therefore, you are restrictive. If you find an ambiguity that is not resolved by the legislative history, how do you deal with that? And it seems to me that it's going to be helpful to everybody to go to trial with some understanding of the statutory application to this case clarified.

Thank you, Your Honor.

THE COURT: Mr. Walsh.

MR. WALSH: Your Honor, I'll respond to Mr. Bell's arguments in the order in which he gave them.

With respect to the meaning of the Section 11(e) of the Bankruptcy Act --

THE COURT: Maybe I better ascertain first how many people are going to want to speak in opposition to Mr. Bell's motion?

Mr. Kohn?

MR. KOHN: I would like to on the last matter, Your Honor.

THE COURT: All right.

MR. WALSH: Section 11(e) is a supplemental statute of limitations applicable to a trustee and it says there's an additional two-year period or if the state limitation is longer than the longer period, in this case three years. And the statute says that if the action is not barred by the statute at the time of the filing of the petition, the the trustee has three years to bring the action.

The issue involved here is that there was a long hiatus between the filing of the petition and the appointment of the Trustee, and Mr. Bell dismisses that problem by stating without citation to authority that you count the three-year period from September of '75 when the petition was filed, totally disregarding when the Trustee was appointed.

Your Honor, I suggest that that just does not make sense because if the Court had delayed the decision on the appointment for a longer period, the Court could have effectively eliminated Section 11(e) all together.

Mr. Bell indicates that the two-year period was almost used up when the appointment was made. And I cited in my brief several cases and, in particular, I directed the Court's attention to the case of Dadney vs. Levy, Second Circuit decision in which a trustee brought an action eight years after the filing of the petition. And the Court held in that case that the statutory period in 11(e) was running until such time as the trustee learned, or should with diligence have learned, of the fraudulent conduct, and I think it logically follows from that case if the Trustee is not in office, he certainly can't learn of the conduct and, therefore, during the period between the filing of the petition and the appointment the statutory period does not run.

With respect to Rule 15(c), again, without citation to authority, Mr. Bell's argument here is that the amendment does not relate back because the amendment is an amendment of the original Complaint and you really should disregard all of the other actions which have been consolidated.

I don't think that's an appropriate way to look at this case. We have consolidated before this Court a whole series of actions which have been pending for a long time in this court and the bankruptcy court. And we could just as easily have amended one of the complaints or counterclaims in the bankruptcy court with respect to this seventh cause of action and, had we done so, Mr. Bell's argument would have been completely eliminated.

The fact of the matter is that the consolidation order has brought within the purview of one case all of the actions and before you look at the seventh cause of action, and if you look at the consolidated case, you will see transactions dating back all the way to 1964, you'll see a series of transactions and relationships which are completely intertwined, and you'll see that the seventh cause of action falls squarely within the time frame and specifically identifies particular transactions which are delineated in the other causes of action.

I pointed out on Page 6 of my brief and briefly recited the facts in the other causes of action -- that of the seven specific transactions enumerated in the seventh cause of action, six of them are specifically delineated as transactions in other cases now consolidated.

And, in addition, most of those are specified in more than two causes of action. For example, the sublease payments is an issue in four of the causes of action, including the seventh cause of action.

THE COURT: Were all of the actions filed within the limitations period?

MR. WALSH: Yes. At least no one has raised that issue heretofore.

THE COURT: You haven't tried to amend anything but the Complaint, but assuming you moved to amend something other than the Bank Holding Company complaint, if 15(c) applied, it would only relate back to the filing of that complaint that you tried to amend, wouldn't it, rather than to the date of the filing of the Bank Holding Company complaint?

MR. WALSH: Yes, it would relate back to whichever amendment -- whichever complaint -- it was appended to. But I'm suggesting now that all of the complaints are unconsolidated. The seventh amendment should be deemed as being appended to the consolidated action and if the transactions identified in the seventh cause of action are transactions which have already been enumerated in any of the other separate causes of action, then it should be deemed to relate back to the complaint which included those causes of action. I believe that's the essence of Rule 15(c) and I pointed this out in my brief that it's a matter of determining whether there are facts set forth in the original complaint which relate to or are in substance the same as the facts underlying the amended cause of action.

I would also point out to the Court's attention -- and I'm looking at Page 10 of my brief -- a citation from Mr. Moore where he notes that where the Plaintiff is merely seeking to change the capacity in which the Defendant is being sued, then the amendment relates back and I mention that in the context that Mr. Bell has repeated again and again, that this is the first time that the Bank has been sued in a fiduciary capacity and that just doesn't make any difference.

Mr. Bell also claims prejudice because he says, "Now we have people no longer associated with the Bank" -- i.e. Hickman and Connor -- "who are knowledgeable regarding these fiduciary relationships and if this cause of action is now brought in the Bank is going to be prejudiced."

Your Honor, if you will review the facts underlying the other causes of action, you will see that Mr. Hickman and Mr. Connor are critical witnesses in many aspects of the case.

If the Bank is going to succeed, for example, in its claim of utility overcharges, Mr. Connor is going to have to present testimony indicating all the way back to 1965 regarding the relationships of the parties regarding cost factors, regarding a whole series of events leading up to the utility overcharge claim which was made by the Bank for the first time in 1974.

There's serious doubt whether Mr. Connor is going to be able to give the kind of testimony needed for the Bank to sustain that case but the fact is that Hickman and Connor are deeply involved in the case, will be testifying regarding events going all the way back to 1964 and I don't think it raises any additional elements to the case to ask them to testify and to subject them to testimony regarding to fiduciary relationship. And in the final analysis, fiduciary relationship is merely a conclusion to be drawn by the Court as a result of the facts to be recited, facts which will be recited in connection with every other aspect of the case.

I'd like now, briefly, to turn to the summary judgment motion and on this point, quite frankly, Your Honor, I'm confused because I wasn't quite sure whether Mr. Bell just said five minutes ago whether he was now not prepared to pursue the summary judgment motion because of the affidavit filed by Unit or whether he was pursuing it. But the fact of the matter is that Mr. Bell has submitted an affidavit by his expert which says that the subject transaction was not an extension of credit as that term is used in the Bank Holding Company Act.

Unit has submitted an affidavit by its expert which says that the subject transaction was an extension of credit. And I can't conceive, under the circumstances, how the Court can grant a summary judgment motion in that context.

Mr. Bell indicated that the Trustee's position was that testimony of the experts was not to be considered but, rather, this was a point of law to be determined by the Court.

I'd like to clarify that. I think what we said was -- and what our brief says -- that the question of whether there was an extension of credit is the ultimate question to be decided by the Court and the Court may entertain expert testimony in reaching its determination.

The only point we were making was that it is not a matter to be left solely to the testimony of experts, and the Court is not required to accept the testimony of experts as stating the ultimate conclusion to be decided in the case.

Your Honor, Mr. Bell didn't raise any argument in rebuttal to the arguments raised in my answering brief so I'm not going to rebut what was not responded to.

That's all I have.

THE COURT: All right.

MR. KOHN: If the Court please, I'll be brief on this issue. Mr. Walsh has more than adequately touched on the majority of the matters upon which I would otherwise comment this morning on -- the motion for summary judgment.

I think it appears clear that in antitrust cases, particularly a grant of summary judgment, it is inappropriate, and the Supreme Court has spoken on that issue in the Fordner cases cited in our brief. We do have conflicting affidavits from experts and that as well should preclude sustaining a motion for summary judgment.

I rise to speak only because I'm concerned about a comment made by Mr. Bell in argument this morning and that is that Sutherland provides some hints in resolving what he now perceives to be a question of statutory interpretation. And I think that should Mr. Bell be permitted to brief these matters, it would be highly prejudicial both to the positions of Freidco as well as the position of Unit.

Mr. Bell chose the manner in which he presented his motion for summary judgment to this Court and we responded in accordance to the Order setting a date for the response and in accordance with the provision of Rule 15(c).

To now permit Mr. Bell to change his tact and change his motion without providing additional time for response I think is highly prejudicial to the parties against which his motion has been filed, and in view of the fact this case is set to commence trial in a week I think is particularly inappropriate. I think that Mr. Bell, of course, may argue at the conclusion of the trial any legal positions he believes supports his position on this issue, but I think as far as the matter of summary judgment is concerned, under the motion, as drafted, and under the rules and the responses that have been filed, I think it's clear that this Court must deny that motion.

Thank you.

THE COURT: I'm not quite sure I understand why you say he changed his motion. I thought he just wanted to file some kind of reply brief.

MR. KOHN: I think what he's saying is look and see how we should interpret the statute and in his brief in support of his motion, there's nothing in there that concerns statutory interpretation one way or another. He's quoted from some of the Congressional reports relating to this statute. He's quoted from some analogous statutes that he claims support Farmers' position.

In both Unit's brief and in Freidco's brief we quoted from statutes which we believe support the Plaintiff's position and I think quite clearly appear more relevant than the statutes quoted by Mr. Bell.

The problem is that if he now wants to refer to Sutherland and say why his statutes ought to be considered this way and Unit's or Freidco's statutes that they have cited in their brief ought to be considered in this other way, or why they should be discounted off, however, I think what it does is it changes the thrust of his motion from one that really was premised on the basis of his export to one that is premised on the basis now of a specific interpretation of a particular statute for which his reasoning has not been given to this time and the statutes which both the Trustee and which Unit have referred to in our brief I think were placed there only to demonstrate that there are several analogous banking statutes which, in fact, support our view of what extension of credit is.

THE COURT: All right, thank you.

Mr. Bell?

MR. BELL: I'll try to proceed in reverse order.

My position on that is that I adhere to it and I still think that the extension of credit issue ought to be decided even if it's not decided as a motion for summary judgment. It's got to be dealt with in preparation for trial and I would hope that the briefing is going to be helpful on it.

I guess what I was trying to say this morning was, having gotten two different briefs with different perspectives from the other side, I haven't just gone back to our original position. I considered what they said. I think we have something constructive to submit to the Court to help deal with the issue and even if the Court doesn't find that it can grant summary judgment at this point, it's still an issue that needs to be dealt with in connection with the trial. And if there can be a ruling on it in advance of trial, then I think it will help all the parties and cut down some of the issues for trial.

The reason I didn't repeat our arguments about analogous statutes this morning is that they're all there in the briefs and, indeed, I can't say to the Court that there aren't some statutes that don't have a broad concept, but it's clear there was a purpose, legislative purpose, for the very broad definition of extension of credit. The opposite we believe is true in connection with this statute and we think that continuing the briefing, obviously, with an opportunity for them to respond some way would simply be helpful.

Mr. Walsh said I didn't give any authorities --

THE COURT: Has anybody looked at the legislative history?

MR. BELL: Oh, yes. We have cited, we quoted what was appropriate. I think if we file a reply brief we are going to direct the Court's attention to the broad thrust of it which doesn't deal with it but the whole sweep of the legislative report may be just as helpful as the few words that we did cite and quote in our brief. The citation that we have in our brief I believe is the only legislative report we found so those pages are in the midst of a lengthy report on this particular Act.

Mr. Walsh said I didn't give any citations for my argument this morning about the statute of limitations on the bankruptcy law. I intended to mention Section 402 as defining what the date of adjudication is. And I'm not going to argue. I don't think Mr. Walsh is right when he says it doesn't make sense that it's the way we say it is, but I don't think that matters. I think it's very clear how it is. And the two years did begin to run and the reason is that the debtor could have filed all these things. And it's only when a receiver is appointed at the beginning and, therefore, the debtor can't file the lawsuits that you have got to protect the receiver some way. As a matter of fact, you know, this lawsuit was started by the debtor-in-possession, 1976.

THE COURT: Do you agree that each of the initial filings in the consolidated matters --

MR. BELL: Were timely?

THE COURT: Were timely.

MR. BELL: No, indeed, and I assumed they hadn't agreed that all of ours were timely. But I don't want to give them ideas, but there are statute of limitation problems -- Your Honor, I tried to figure out why they are pleading the seventh cause of action. They are claiming recovery of $58,000 or something which they have already pleaded recovery of over here.

Now, why are they trying to make an agency thing out of it? It appears to me they are just trying to avoid the statute of limitations. I'm just reading into their pleading. I've looked at the seventh cause of action many, many times and I can't figure out why. And the best I can figure is they're trying to avoid the statute on all those claims they're complaining about.

And, in regard to our prejudice, it's not just Hickman and Connor. It's Unit people. You know, when they talk about disclosure, they're talking about what did Ed Connor say to Roy Norwood as Unit was charging 200 a month during some of these months for supervision of local management.

What was disclosed between the Delaware people who don't work for us and the Unit people who aren't even coming to trial? Pauline Bond may not make it. Roy Norwood, getting $200 a month to oversee our people. When you talk about disclosure, you're talking about different people and a whole different subject.

Thank you. I think I've touched everything.

THE COURT: All right.

Mr. Moore, I believe you have a motion.

MR. MOORE: Your Honor, I have nothing further to add than what is contained in the papers that I filed with the Court.

THE COURT: All right. Has your client been notified of your motion?

MR. MOORE: Mr. Kohn has been notified. I gave him a copy of the documents on Friday afternoon. I have not been in touch directly with anyone else since it's always been the custom to contact directly through Mr. Kohn and Mr. Unger.

THE COURT: Mr. Kohn, are you in a position to state Unit's position with respect to Mr. Moore's motion?

MR. KOHN: Your Honor, last evening -- let me back up. Mr. Moore advised me sometime prior to noon on Friday, when I telephoned him to advise him that I would be catching the noon flight to Washington and, hopefully, to catch the Metroliner which would bring me up in time to file our papers which were due at 5:00

o'clock. During that phone conversation Mr. Moore advised me that he would be filing a motion to withdraw. I immediately attempted to telephone Mr. Morris at Unit, I think, and was advised he was out of town and would not be back in the office until Monday.

I was able to reach Mr. Morris late last evening at his house. I advised him of Mr. Moore's motion and we are permitted to go forward -- prepared to go forward, rather -- if the Court entertains the motion at this time.

We did not have the opportunity to sit down and discuss for a lengthy period of time the implications of the motion, nor were we able to discuss the matter with Mr. Unger, who is out of the country, for whom, to the best of my knowledge, our office has only a Telex number.

I guess our position is that we are now a week before trial and if Mr. Moore believes that he must withdraw, we will certainly not oppose the motion to withdraw although we feel we would be severely disadvantaged at that point because we would be, essentially, required to appear at trial without local counsel, but I don't want to speak any further until Mr. Moore presents his motion to the Court and then I will speak at that point.

THE COURT: Well, I don't know that you can count on being permitted to do that. If I were in your client's position, I think I would be actively pursuing local representation should Mr. Moore's motion be granted.

MR. KOHN: Your Honor, I will speak to that.If Your Honor wants me to argue that motion at the moment -- or speak to the matter at the moment -- I will. Otherwise, I will allow Mr. Moore to present his motion to the Court and then I will speak to the issue.

I believe that one week to find local counsel and familiarize local counsel with the intricacies of this case is simply not reasonable under the circumstances and should Mr. Moore's motion be granted, Unit would respectfully move the Court for a continuance at that point.

This is the reason why we state that while we have no objection to it, it's a difficult matter to address one way or the other. Obviously, we would prefer to go to trial with Mr. Moore as local counsel and not disrupt the proceedings further.

I really don't want to step into Mr. Moore's time here.

THE COURT: I think Mr. Moore has made his presentation.

MR. KOHN: Okay.

THE COURT: All right. Let's move on to the other -- I'm sorry, do you want to say something further on that?

MR. KOHN: Well, Your Honor, I think the code of professional responsibility -- I did have the opportunity to discuss this with Mr. Morris because I wanted to know what his views were on the issue and, basically, I advised him that there was both an ethical consideration and a disciplinary rule which suggests and requires, respectively, that counsel give due notice to avoid causing prejudice to a client if counsel feels that he must withdraw his representation in enough time to enable the client to secure adequate representation to continue with the matter.

I raised this issue with Mr. Morris because I did not want to be in the position of saying to the Court that, well, if the attorney doesn't want to represent us, then we, obviously, would feel uncomfortable with the attorney, knowing that we have a week to go prior to trial.

I think that for this reason, obviously, Mr. Moore has carefully thought out the position that he feels he must take in this matter. But I think that under the circumstances to require Unit to enter into this particular trial with one week's notice without local counsel, I think is simply insufficient time. Unfortunately, I cannot devote the entire week to being in Wilmington to search for local counsel and, as Your Honor may know, in the bankruptcy proceeding as well as this proceeding, there have been a number of law firms of established repute in the community that have appeared on behalf of creditors or other persons and with whom we would obviously be precluded from retaining as local counsel and that, of course, makes our search somewhat more difficult at this point.

THE COURT: To what rule do you refer?

MR. KOHN: Disciplinary Rule -- I believe it's Ethical Consideration 2-32 and Disciplinary Rule 2-110 and I believe it's (a)(2) or (a)(3). I believe it's 2-110(a)(2) or (a)(3). I don't have the specific subsection to which that refers.

THE COURT: All right. Do you want to say anything further in response to that?

MR. MOORE: Of course, Your Honor, the motion is purely the result of an action which was taken without my knowledge, without my consent, and to which I still refuse to give my consent. And I don't think the coin can be turned and the suggestion made that somehow or other I'm acting precipitously when I'm simply doing what I feel is a compulsory act on my part when certain positions are advanced without either my knowledge or consent and are clearly contrary to the known facts. And under those circumstances, if that matter is to be pursued, I don't see how I can conceivably remain in this lawsuit. And, as I indicated to the Court, I'm advised that, indeed, that matter regarding Mr. Tybout is going to be pursued and if that is the case, I think my co-counsel have put the fat in the fire themselves and it can't be turned any other way.

THE COURT: All right. Do you want to speak to the remaining motion, Mr. Tybout?

MR. TYBOUT: The motion to withdraw I suppose calls for some comment on our part -- a motion for leave to withdraw -- and the Trustee has no objection to it.

With reference to Unit's position that there's some prejudice due to the lateness of the motion, of course we think the motion isn't late. The issue has just come to a head -- the issue raised by Unit -- but we should point out to the Court that the prejudice which Unit raises really doesn't exist since it was never anticipated that Mr. Moore would take an active role in the litigation, and he hasn't to date.

He has been, as I understand it, present --

at least he hasn't in the last year or two, last several years. He has been the attorney of record to comply with this Court's local rules which require an attorney of record admitted to practice in this state, and I suggest to the Court that there is no prejudice which would inure to Unit by the granting of the motion except the obligation to find somebody who is willing to stand before this Court and say, "I put my reputation and my belief in the ethics of the bar in this state on the line for this particular party and the attorneys who are coming here from out of state."

That's the entire purpose of the attorney of this bar appearing. And when an attorney such as Mr. Moore feels that he can no longer support that position, then I think it's incumbent on Unit and their attorneys from somewhere to get someone else who will say, "I'll do that."

And that, of course, was the purpose of our motion to strike, to strike the motion to disqualify. It is, essentially, a technical matter but was filed by the Trustee -- by the Trustee and me both signing it -- because we were aware that, in fact, there was a fundamental difference in the matter of Unit and its counsel and that the local counsel for Unit felt that this motion was simply unconscionable and could not be signed by him and we thought that should be before the Court and, of course, it is.

Now, I'm not clear whether Your Honor feels that the motion itself -- motion to disqualify -- is before the Court. Does the Court care to hear comment on it?

THE COURT: I'm not sure whether it's before the Court, either, but I'm willing to hear comment on it.

MR. TYBOUT: I filed an affidavit to the Court on, to some extent, the merits and I handed it to Your Honor at the beginning of the hearing today. Has Your Honor had a chance to glance through it?

THE COURT: No, I have not.

MR. TYBOUT: Okay. The motion to strike I think puts before the Court squarely the issue of whether the out-of-state counsel is going to be bound to have a local counsel put himself, in effect, on the line in proceedings before this Court.

I had hoped that -- continued to hope -- that while that, in effect, technical motion has the purpose that it was intended to, that the Court would hear the balance of the issue, the issue on the merits, so that matter can be resolved.

It's not a happy position, as far as I'm concerned. The affidavit notes that I was contacted by Mr. Walsh as Trustee in the summer of 1978 for the purpose of inquiring whether I would be willing to act as a counsel for the Trustee and I said that I would.

We had some conferences, Mr. Walsh and I, and over the course of the summer, and I brought back to my office some papers, quantity of papers involving the issues and they were somewhere in my office -- my secretary's desk or something of the sort -- when our associate, Mr. Elzufon, who had come into the office in December of 1976, noticed them and inquired about how they got there and then told me of his participation in the case, as his contribution principally was of working on the brief, although he said he met Mr. Morris, who was something of a character -- discussed it briefly at that time.

Within hours I called Mr. Moore's office and spoke to him about it and he told me at that time that, of course, he knew Elzufon was in my office. They had been fairly closely associated in Killoran & VanBrunt, as I understand it, and he said that he saw no objection to my acting as Trustee.

I proceeded with that and I mentioned at that time to Mr. Moore that in any event Elzufon would be having nothing to do with it, and since Mr. Walsh had asked insofar as if there was any backup work to do, his office would do it, there was no indication for me to get anyone in my office to work on it and I haven't.

When this matter came up -- well, let me back up. Mr. Morris's deposition was taken, I think, two weeks or so ago and sometime, as I recall, during a morning break in the deposition -- deposition lasted all day -- Mr. Elzufon, who was in the office, came out and saw Mr. Morris and walked up and shook hands, reminded him they had met before at another part of the litigation and they spoke briefly. I saw they were talking but I didn't inquire about it and we proceeded with the deposition. We finished the morning session, had lunch and went through the afternoon session and disbanded.

In Mr. Morris' affidavit, Paragraph 3, he refers to John Elzufon coming up and introducing himself and recalling that he had previously worked with Drew Moore on this case. Then in Paragraph 3 he says:

> "At the next convenient break, I inquired of my attorney, Sherman Unger, how Mr. Tybout could represent the Trustee in this action against Unit when one of Unit's former attorneys worked for him."

Well, be that as it may, the question was never raised in the course of the deposition. The deposition proceeded. If Mr. Unger was surprised, in his affidavit, swearing -- although he seems to have changed his mind at some point after the affidavit -- if his affidavit, swearing that he had no knowledge of the matter,is correct and if Mr. Morris is correct, it's hard to imagine how the matter didn't come up as soon as we reassembled for the continuation of the deposition, but it did not.

Now, I have read the brief of the moving party -- Unit's brief -- and the authorities and I agree that there is a question because since this matter has come up, I've spoken to Mr. Elzufon at greater length than I did before, and had the question been raised at the outset, I think being the, in effect, coward I am in connection with conflict-of-interest matters, I would have promptly avoided having anything to do with it.

Mr. Elzufon tells me he did, in fact, talk to Mr. Morris. I did work on the brief and didn't participate -- he attended some conferences before a deposition, so there's the question to be raised and I would not have participated had the question been raised at the outset.

At this point, however, I think we simply have to submit the matter to the Court and let the Court make a recommendation or ruling or whatever it sees fit. We are a year and a half down the road from the time of my appointment. I have something like 300 hours invested in it. We have a week to go before the hearing as scheduled. And I think in view of the background facts, the Court has a very real question before it about whether there really is concern on Mr. Morris' part -- on Mr. Unger's part -- about whether there is a problem about a conflict of interest.

As I said at the outset, if this matter had come out at the outset, if Mr. Morris had expressed a reservation or if Mr. Unger had, I think that by far the easiest thing to do would simply have been to say, "I don't have any interest in pursuing the matter further. But I think we have a different picture now and I think I'll simply have to present that to the Court and await the Court's ruling. I'm speaking for the Trustee as well as my own position.

THE COURT: Thank you, Mr. Tybout.

Does anybody want to speak further on that matter?

Mr. Kohn, I think we better complete the record. My understanding is that the motion, affidavit and brief are not filed with the Clerk; is that right?

MR. KOHN: Your Honor, it's my

understanding they were returned to Connolly, Bove & Lodge and, to the best of my knowledge and belief, they are still within the possession of Connolly, Bove & Lodge.

MR. MOORE: I have them here, Your Honor.

THE COURT: All right. I will make them a part of the record myself. Will you hand them to the Clerk, please?

Do you want to say anything further on this?

MR. KOHN: I would like to address a few comments in light of Mr. Tybout's comments.

THE COURT: All right.

MR. KOHN: If the Court please, as I mentioned in Chambers when this issue was first raised, it's a difficult, personal matter for me to have to argue and as Your Honor has not had the chance to read either the moving party's or Unit's brief, I want to make it absolutely clear that nowhere in there have we ever accused the Trustees or Mr. Tybout of any bad motives, bad faith or attempting to mislead anyone; that our position was raised for two reasons.

Number one was Mr. Morris' comment and number two, Unit is still a debtor-in-possession in its Chapter 11 proceeding back in Cincinnati, and I remember raising to the Court at that conference the issue that we had,that as a debtor-in-possession we have some fiduciary duty to the creditors in that proceeding. The Trustee in these consolidated proceedings has brought an action against Unit in which it seeks an amount in excess of a quarter of a million dollars from Unit. And one of the difficult decisions a counsel must make in terms of his representation is a decision such as the one that was made in this particular case, and sometimes like a doctor who takes an x ray when he's almost positive there's nothing going to show in the x ray but he does it because he has to protect the hospital and himself, this is a situation where a decision was made that a ruling from this Court, even one adverse to Unit's position, is one which could not be challenged by the creditors of Unit back in Unit's proceedings back in Cincinnati.

Unit has attempted to discharge its duty, the Court ruled adversely and Unit at least carried out its fiduciary obligations to its creditors.

The motion, Your Honor, was based on two canons -- 4 and 9 -- and while the factual, if you please, the factual application really comes from Canon 4, I think Canon 9 is the one which is controlling here and that is the avoidance of even an appearance of impropriety.

As I suggested or stated earlier, we have not accused nor do we accuse either Mr. Tybout or the Trustees of committing any impropriety whatsoever. Rather, the prior representation of Mr. Elzufon raises a question of one of appearance and the cases as we found them and as I advised Your Honor that day suggest that where an appearance is raised, withdrawal or disqualification is appropriate.

I don't think that there is a large question about the facts of many of the relationships here. I won't belabor them. I don't think there's a question of the fact that the Trustee's action against Unit arises from a same or similar factual basis as the Bank Holding Company claims. So I won't belabor those as well.

I do need, however, to complete the record to make known a matter Mr. Moore did not speak to this morning but was contained in his affidavit filed in support of his motions to withdraw.

On recollecting the dates now, Your Honor, I believe it was Thursday of last week I received a telephone call from Mr. Moore -- Mr. Unger had already left the office and was en route to a trip out of the country -- and Mr. Moore related a matter to me which he felt contradicted a factual assertion contained in Mr. Unger's affidavit and essentially asked me to run it down.

The matter involved something which was contained in a letter from Mr. Moore to Mr. Unger regarding a matter in which Mr. Unger had sought Mr. Moore's professional opinion on a personal matter. It was a matter which had some connection to these proceedings but was not directly a part of these proceedings. It was a personal matter on which Mr. Unger had sought the advice.

I checked our firm's files, both during and after that conversation, and was unable to find a copy of the letter to which Mr. Moore alluded; and I told Mr. Moore in the conversation that if it was a personal matter, as he had advised me, that it was probably contained in Mr. Unger's personal file, which he keeps locked by his desk.

I was able to catch Mr. Unger as he changed planes in Miami, I believe -- I am still not sure what city it was — and related the conversations to him then between Mr. Moore and myself.

Mr. Unger stated to me first that he certainly recalled the letter, the letter was a personal matter, it was residing in his locked file, and he has never made the contents of that letter known to anybody at the office or to Unit or to anybody else.

Second, that he had no reason to doubt Mr. Moore's assertion that a certain paragraph contained therein was true and correct and basically that paragraph had the -- I am trying to phrase this properly because I really don't wish to be in a position of waiving an attorney-client confidence -- but it was basically conveying to Mr. Unger, at the time the letter was written, knowledge of Mr. Tybout's presence as a lawyer in the Wilmington community and the fact that Mr. Elzufon was associated with his firm.

This letter was written February 23 of 1978, some six months prior to the Trustee's application to appoint Mr. Tybout. Mr. Unger statedto me -- and this is a conflict from another paragraph of Mr. Moore's affidavit, and I won't belabor that fact -- that at the time that the matter was brought before Judge Balick, Mr. Unger did not recall the mention of Mr. Tybout in the previous communication as the attorney to whom Mr. Moore had referred and made no connection at the time that we either supported or took no position. There have been two applications regarding Mr. Tybout, and on one we took no position; the other we supported.

To the extent that Mr. Unger's affidavit leaves the impression that he was never made aware prior to the date of the appointment of Mr. Tybout, that impression is incorrect. Mr. Unger did state at the time that he dictated his affidavit that he still had no recollection of the letter written by Mr. Moore and that the connection became clear only when I called him and specifically referred to a letter of that date, and while he said that he could not be exactly sure that Mr. Tybout was contained in there, he certainly had no reason to doubt Mr. Moore's assertion and that he believedit to be true, and that I should appear before this Court and correct any misinterpretation which was contained in his affidavit.

I believe that our brief sets forth what we believe to be the applicable legal standards in this matter, and it is a painful matter for everybody concerned, Your Honor, and for that reason I will say nothing further unless the Court desires.

THE COURT: Mr. Moore, do you want to say anything further?

MR. MOORE: It is correct that the letter that I wrote on February 23 dealt with matters that were not specifically related to all the various issues in this proceeding, but it arose out of proceedings in this case and how Mr. Unger chose to treat it is something that I can't comment on. In any event, I do have the letter here.

I do not believe that it's the sort of letter that really ought to receive any wide circulation because I don't think it will aid in the resolution of the merits of this case but to the extent that will correct any misstatements that appear on the record, I think I'm required to reveal it to the Court under Disciplinary Rule 4-110 and 9-102 and I will be glad to pass it to the Court if the Court desires and particularly I would address the Court's attention to Page 8, the second paragraph.

THE COURT: I take it from what you say there's only one relevant segment?

MR. MOORE: That's correct, Your Honor.

THE COURT: Would reading it do anything in addition to how it's being characterized, represented to the Court? I shouldn't think so.

MR. MOORE: I don't believe so. I mean, it's clear that I revealed that Mr. Elzufon was associated with Mr. Tybout and that's the message --

THE COURT: I'm willing to accept that representation.

MR. KOHN: I might add, Your Honor, that Mr. Moore offerred to make a copy of that letter available to me. Since Mr. Unger had not made it available to me, I did decline the invitation.

THE COURT: All right.

MR. KOHN: I personally have no doubt as to the accuracy of the comment.

MR. TYBOUT: The affidavit of Mr. Moore points out not only that that letter was sent in February but that at the time of the application, Mr. Moore reminded Mr. Unger that I was the person to whom he had referred previously and that Mr. Elzufon was, in fact, associated with me. That was at the time of the hearing. Now Mr. Kohn calls this a painful matter but if I understand the painful matter, the pain exists in the fact that Mr. Unger didn't communicate with his client, Mr. Morris, about this situation. And that may be painful to Mr. Kohn and Mr. Unger but it doesn't seem to me that the Trustees should be penalized. The question is at this point, if Mr. Unger acquiesces without Mr. Morris' approval, where should Mr. Morris look? It seems to me that that's what the Court has to resolve.

THE COURT: Court stands in recess.

(Court recessed at 10:20 o'clock a.m.)

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I hereby certify that the foregoing is a true and accurate transcript from my stenographic notes in the proceeding.

Offical Court Reporter
U. S. District Court

I hereby certify that the foregoing is a true and accurate transcript from my stenographic notes in the proceeding.

Official Court Reporter
U. S. District Court

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STATEMENT OF
MALCOLM BALDRIGE
SECRETARY OF COMMERCE
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

September 29, 1983

I am pleased to be here to testify in support of the nomination of Sherman Unger to be a Judge of the U.S. Court of Appeals for the Federal Circuit.

I met Sherman Unger in January 1981 when I was looking for a General Counsel at the Department of Commerce. He was clearly the most qualified candidate for the job. He was bright, aggressive and an experienced and successful practicing lawyer. He had a sincere desire to serve in the Reagan Administration and left a lucrative private practice to do so.

Mr. Unger has been an extremely successful General Counsel. In the two and a half years we've worked together, I've gotten to know him well. He is a man of absolute integrity. He is also very tough; a real fighter. He does not quit. He has done an outstanding job organizing and running the large law office we have at Commerce. I've relied on his mature judgement and good sense. He has advised me on some very complicated issues and he has been right every time.

As General Counsel of the Department of Commerce, Mr. Unger was deeply involved in the trade and antitrust issues considered by the Department in connection with our negotiations of the steel arrangements entered into with the European Community.

In connection with the Department's administration of the countervailing duty statutes, Mr. Unger has been at the forefront of the Department's consideration of the complicated legal questions involved in defining what governmental actions constitute subsidy and the appropriate methodology to be used by the Department of Commerce in determining the value of the subsidy.

Mr. Unger led the legal team which conducted the review of the Administration's authority to impose sanctions on foreign subsidiaries of American firms which violated American restrictions on the transfer of U.S. technology for use on the Soviet Pipeline to Europe. He led the defense of the Administration's decision to apply sanctions in the pipeline cases.

Mr. Unger has been a loyal, hard working and efficient team player. I hate to lose him, but I know how much he wants this appointment and I respect his decision. I suppose every lawyer hopes he can some day serve on the bench.

I believe Mr. Unger will be an excellent Judge. I know that he has a great respect for the law and a strong sense of the function of the Judiciary in our system of government. I know that he has firsthand knowledge of the issues that will be brought to the Court on which he is to serve.

Commerce is losing one of the best General Counsel's in government, but I believe that the U.S. Court of Appeals for the Federal Circuit is getting a man who will be a distinguished judge.

STATEMENT OF

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GRIFFIN B. BELL

BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NOMINATION OF SHERMAN EDWARD UNGER AS
UNITED STATES CIRCUIT JUDGE FOR THE
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

September 29, 1983

Thank you for permitting me to appear before the Committee today in support of the nomination of Honorable SHERMAN UNGER to serve as a member of the United States Court of Appeals for the Federal Circuit.

I served as a United States Circuit Judge myself for a number of years and also as Attorney General of the United States during the period January, 1977 to August, 1979. During the time that I was Attorney General, I was responsible for processing the nominations of more than two hundred federal judges. I read the FBI file on each of the nominees and considered the comments of the American Bar and other groups with respect to the qualifications of the nominees.

Beginning during the administration of President Eisenhower, the American Bar Association has been allowed to comment to the Attorney General on nominees to the Federal Courts. The role of the American Bar is to comment after making its own inquiry but being careful not to intrude on the Constitutional prerogatives of the President to nominate and the Senate to confirm. My relationship with the American Bar was excellent indeed and I found their views useful in most cases. There was one occasion where I differed with their views and they persisted in their view that the nominee was unqualified and appeared before this Committee to object. I called every federal judge in the state in question and, without exception, they reported to me that the nominee was well qualified, often in court, enjoying a good practice and having the highest professional rating. The American Bar Committee was relying on something that was said by lawyers having to do with a trial many years before.

My experience in reviewing the FBI files taught me that vigorous trial lawyers occasionally pick up an enemy or two as they go through life. These reports have to be considered in light of one's own experiences in the legal profession and the judgment whether a person is qualified or unqualified depends not only upon the nominee's knowledge of the law and integrity but upon the nominee's temperament and whether the nominee has or is likely to exhibit prejudice.

With respect to Mr. Unger, I have inquired and have not been advised that he has ever shown the slightest sign of prejudice toward anyone. I know firsthand that he possesses more than the requisite amount of legal knowledge. I know firsthand that he is experienced and I believe that I know firsthand that he is a lawyer of integrity. I have known him for about three years and believe that he has the proper temperament to serve as a judge.

My experience and knowledge of Mr. Unger dates back to 1980 when he asked me to serve as an expert witness on a legal fee in litigation having to do with a stockholder's suit where he had represented the plaintiffs. He had Professors Louis Loss and Arthur Miller of Harvard associated with him and I appeared on behalf of all three. After going into detail in what had been a complex legal proceeding, I concluded that they were entitled to a very substantial fee and so testified. This testimony was in the Federal Court in Cincinnatti, Mr. Unger's home town, and I never heard any comment or even a rumor, in or out of court, that there was anything wrong with Mr. Unger as a lawyer. He had a reputation as an accomplished lawyer and had much experience in complex litigation.

After he joined the Government as General Counsel of the Department of Commerce, I had occasion to contact him at least twice and he was very professional in both instances. I observed that he had a position of high responsibility in the Government and seemed to be well regarded in his endeavors.

Based on the facts as I have them, I recommend that Mr. Unger be confirmed. I think that he will serve our nation well on the Court of Appeals for the Federal Circuit.

Thank you, Mr. Chairman and Members of the Committee.

STATEMENT OF LLOYD N. CUTLER
BEFORE THE SENATE COMMITTEE
ON THE JUDICIARY
SEPTEMBER 29, 1983

My name is Lloyd Cutler, and I am here to testify in support of the nomination of Sherman Unger to be a Judge of the United States Court of Appeals for the Federal Circuit.

I have been a practicing lawyer in Washington for 40 years. I have been an active participant in the affairs of the American Bar Association, and while I have never been a member of its Standing Committee on the Federal Judiciary, I have worked closely with the chairpersons and members of that Committee on numerous judicial nominations. During my service as Counsel to the President in 1979 and 1980 I was an active participant on the Executive Branch side of the judicial nominating process.

It is common ground that Sherman Unger possesses the intellectual qualifications and the public and private legal experience required for service as a Judge of the new Federal Circuit. The questions that have been raised relate solely to whether he possesses the integrity and temperament that are required for service on the federal appellate bench.

I first met Mr. Unger when he was General Counsel of Department of Housing and Urban Development a decade ago, but I had no professional experience with him at that time nor during his subsequent private law practice in Cincinnati. However since his appointment in 1981 as General Counsel of the Department of Commerce, I have had extensive professional dealings with him, much of it in a litigating context. Some of this experience was as his adversary, in the course of adjudicatory administrative and judicial proceedings involving government charges of export control violations against a European client of our firm. Some of it involved foreign adversarial proceedings against an American client of our firm in which the United States Government supported our client's position and Mr. Unger was the designated spokesman to present the Government's views to the responsible foreign authorities.

Throughout this current experience over the last two and one-half years, I found no basis whatever for questioning Mr. Unger's integrity or his temperament in a litigation context or any other context. To the contrary he discharged his responsibilities with complete candor and calm. He was fair, judicious and, in my judgment, extremely effective in advocating the Government's views. You have heard firsthand that this appraisal is shared by his principal Government client, the Secretary of Commerce, and I know it is shared by the lawyers in other Government departments with whom he has worked.

I have great respect for the ABA's Standing Committee on the Federal Judiciary and particularly for my good friend Bill Coleman. I have been over the Committee's report in detail, and I have presented my views to Mr. Coleman while he was preparing his report. There are three reasons, however, why I do not accept the Committee's conclusions about Mr. Unger's integrity and temperament.

The first, of course, is my own direct experience with Mr. Unger over the past two and one-half years. If Mr. Unger were anywhere near as lacking in integrity and temperament as the ABA report concludes, almost certainly those deficiencies would have manifested themselves during his service, much of it in a litigating context, as General Counsel of the Department of Commerce. Yet no one who has worked with Mr. Unger during this period -- in or out of government -- has observed any such failing, and the Committee report refers only to praise, not criticism, of Mr. Unger's performance as General Counsel of the Commerce Department.

Second, while I have no firsthand knowledge of Mr. Unger's conduct as a litigating lawyer in private practice, I have had personal and professional relationships with some of the principal critics of Mr. Unger on whom the ABA Committee relies. Based on these relationships

I would personally be inclined to discount their criticisms of Mr. Unger's conduct.

Third, I note that after thorough FBI investigations and thorough consideration of the Standing Committee's report and close checking of its sources, the responsible officials of the Department of Justice have advised you that they found no evidence in support of the allegations against Mr. Unger sufficient to constitute a bar to his confirmation. Based on my knowledge of these officials, I believe their standards for judging the integrity and temperament of judicial nominees are as high as those of previous Administrations, including the one in which I served.

Accordingly I join the Department of Justice in urging this Committee to report favorably on Mr. Unger's nomination.

28 A

TAFT, STETTINIUS & HOLLISTER
FIRST NATIONAL BANK CENTER
FOUNTAIN SQUARE
CINCINNATI, OHIO 45202
513-381-2838
CABLE: TAFTHOL TWX: 810-461-2623

DAYTON, OHIO TELEPHONE 222-0050

WASHINGTON OFFICE
SUITE 706
1800 MASSACHUSETTS AVENUE, N.W.
WASHINGTON, D.C. 20036
202-223-8651

ROBERT TAFT, JR.
RANDOLPH J. STAYIN

VIRGINIA E. HOPKINS
JOAN M. ROHALIK

J. MACK SWIGERT
ROBERT TAFT, JR.
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• STEPHEN M. GRIFFIN, JR.
BARTON A. [illegible]
ROBERT S. CRAIG

J. THOMAS CRUTCHER
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• ON MILITARY LEAVE

JOHN W. HUDSON
DAVID G. GAMBLE
ROBERT T. KEELER
OF COUNSEL

December 3, 1982

William T. Coleman, Jr., Esq.
O'Melveny & Myers
Suite 500
South Lobby
1800 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Coleman:

I understand that Sherman E. Unger, General Counsel of the Department of Commerce, is being considered for an appointment as Judge of the United States Court of Appeals for the Federal Circuit.

I have known and worked with Sherman E. Unger over many years in quite a number of governmental and political matters and I am happy to recommend his favorable consideration. While we have sometimes held different views, I feel that he has the ability and dedication to carry out the duties of the position with distinction.

Sincerely yours,

Bob Taft Jr.

Robert Taft, Jr.

RTJr:nfg

BARNETT & ALAGIA
1627 K STREET, N.W.
WASHINGTON, D.C. 20006

TELEPHONE
(202) 785-0500

TELECOPIER
(202) 775-9089

CABLE ALBAR

TELEX 89-2445

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[illegible]
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RUFUS E. WILSON
OF COUNSEL

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JACKSON, MISSISSIPPI
ATLANTA, GEORGIA
NEW ALBANY, INDIANA

*NOT ADMITTED DISTRICT OF COLUMBIA

B

November 17, 1982

William T. Coleman, Jr., Esquire
O'Melveney & Myers
Suite 500 South
1800 M Street, N. W.
Washington, D. C. 20036

Dear Bill:

This is in regard to the consideration of the name of Sherman Unger, Esquire for a vacancy on the U.S. Court of Appeals for the Federal Circuit.

I have known Mr. Unger for more than 15 years and I know him to be an excellent lawyer and well qualified.

I feel personally that Mr. Unger can satisfactorily answer any questions directed to him regarding his personal and professional life.

Having followed his career with interest, I sincerely hope favorable action can be taken by the American Bar Association Standing Committee on Federal Judiciary.

With best personal regards,

Sincerely yours,

Hugh Scott

Hugh Scott

HS/sho

C

WILMER, CUTLER & PICKERING
1666 K STREET, N.W.
WASHINGTON, D.C. 20006

CABLE ADDRESS: WICRING WASH., D.C.
INTERNATIONAL TELEX: 440-239
TELEX: 89-2402
TELEPHONE 202 872-6000

LLOYD N. CUTLER
DIRECT LINE (202)
872-6100

EUROPEAN OFFICE
1 COLLEGE HILL
LONDON, EC4R 2RA, ENGLAND
TELEPHONE 01-236-2401
TELEX: 851 883242
CABLE ADDRESS: WICRING LONDON

November 2, 1982

PRIVATE AND CONFIDENTIAL

William T. Coleman, Jr., Esquire
O'Melveny & Myers
1800 M Street, N.W.
Washington, D.C. 20036

Dear Bill:

As you know, my support of Sherman Unger for nomination to the vacancy on the Court of Appeals for the Federal Circuit is based on my experience in working with him over the last 18 months and a general awareness of his earlier career as a trial lawyer in Cincinnati.

I understand that the principal concerns about his qualifications arise out of two affidavits filed in Donohoo v. American Financial Corporation (S.D. Ohio No. C-1-76-277), one signed by Gary P. Kreider of Keating, Muething & Klekamp and the other by Charles Berghaussen, a security guard employed by American Financial Corporation. I have now read these affidavits. Our firm has also had some personal experience with Kreider's law firm and American Financial Corporation.

Based on this reading and this experience, I do not believe the affidavits are worthy of belief. My reasons are as follows:

1. The affidavits describe events (and impressions about events) that occurred six years before the affidavits were signed.

2. The affidavits contain internal inconsistencies. For example, Kreider places the events and impressions in August 1972. Berghaussen places them in July 1972. Berghaussen's affidavit says that "Kreider informed me that UNGER indicated to him that UNGER had a gun." The Kreider affidavit mentions nothing about a gun.

3. Unger's own reply affidavit describes the same two conversations. It makes no reference to remarks about suicide, threats of violence or possession of a gun. Mr. Unger has advised me that no such statements were made and that he did not have a gun.

4. The affidavits were filed as part of an American Financial effort to have Unger removed as opposing counsel in a series of trials because of his former employment by American Financial. They were ignored by the judges who received them, and the effort to remove Unger was abandoned.

5. Our firm was retained by American Financial to handle the SEC aspects of a "going private" transaction in 1978 in which the Lindners, as offerors, and the Keating firm were conflicted. During this engagement, we worked with Mr. Kreider and other members of the Keating firm. Because of concern about the adequacy of disclosure and failures to consult with us before the issuance of critical press statements, we decided to withdraw from participation as counsel. While I did not personally work on the matter, I was fully involved in the decision to withdraw. As you know, firms like yours and ours do not reach such decisions lightly, especially when large amounts of current and potential future business are involved.

6. Our judgment on withdrawal was subsequently confirmed when the SEC instituted a related proceeding against American Financial and another against Keating, Muething & Klekamp for alleged misconduct in the firm's securities work for American Financial. The firm submitted an offer of settlement which the Commission accepted. As part of this acceptance, the Commission published its findings of facts and conclusions of law. Although the firm did not admit or deny the SEC's

findings, the firm did not challenge the Commission's Order containing its findings and imposing remedial sanctions. A copy of that Order is attached. Mr. Kreider, as you may know, is the principal securities lawyer in the Keating firm, and did much of its securities work for American Financial. Because of our own direct experience and the findings set forth in the SEC Order, I do not believe that Mr. Kreider's affidavit, apart from its internal deficiencies, should be given any significant weight.

It is also worth noting that for the past 18 months, Sherman Unger has served as General Counsel of a major Government department under conditions of great pressure, and that he has performed with distinction and without evidencing any sign of emotional instability or lack of coolness or judgment under fire. The high regard held for him by the Secretary of his department and his legal colleagues in the Government and the Washington Bar should tower far above the stale affidavit of a lawyer, subsequently disciplined for misconduct by the SEC, who was Unger's antagonist in a series of bitterly contested lawsuits.

Sincerely,

Lloyd

Lloyd N. Cutler

Attachment

Hamilton County Municipal Court
222 E. CENTRAL PARKWAY
CINCINNATI, OHIO 45202

JUDGE
MARK P. PAINTER

D

December 3, 1982

Louis Van Duesen, Jr., Esq.
1100 Philadelphia National Bank Bldg.
Broad and Chestnut Streets
Philadelphia, Pennsylvania 19107

RE: Sherman E. Unger

Dear Mr. Van Duesen:

I have known Sherman Unger for quite some time, and would support his appointment to any judicial position. Before assuming the bench, I was a tenant in his suite of offices for over a year, and had an opportunity to observe his temperament, integrity and legal ability; I can state that all three are of the highest caliber.

I tried to reach you by phone this date, but I was leaving town for the National College of the State Judiciary in Reno. However, I would be more than happy to speak with you by phone. My office (513-632-8622) will be able to reach me.

Thank you very much for any consideration you might give.

Sincerely yours,

Mark P. Painter

MARK P. PAINTER
Judge

MPP:pg

LAW OFFICES
BARNETT & ALAGIA
1627 K STREET, N.W.
WASHINGTON, D.C. 20006

TELEPHONE
(202) 785-0500

TELECOPIER
(202) 775-9089

CABLE ALBAR

TELEX 89-2445

D. PAUL ALAGIA, JR., P.S.C.
BERNARD H. BARNETT
HUGH SCOTT
HERMAN E. TALMADGE
WILLIAM A. CAREY
MARION EDWYN HARRISON, P.C.
ALLAN B. SOLOMON*
RICHARD M. TRAUTWEIN
RUDY YESSIN*
L. ARNOLD PYLE
H. DAVID HERMANSDORFER*
JOSEPH M. DAY*
ST. JOHN BARRETT
RICHARD A. GLADSTONE
RONALD L. GAFFNEY*
DONALD F. MINTMIRE
JAMES L. COORSSEN*
RICHARD FROCKT*
MICHAEL E. LANNON*
A. PAUL PROSPERI*
CHARLES DAWSON BARNETT
WILLIAM A. PYLE*
SHRADER R. MILLER*
MORTON HOLLANDER
CHARLES W. CHAPMAN
THOMAS R. HENDERSHOT
M. KATHLEEN CARPENTER
LESTER I. ADAMS, JR.*
MARIE J. ALAGIA*

KENNETH J. BADER*
RAYMOND B. BANNON*
ROBERT W. BISHOP*
W. GARY BLACKBURN*
ROBERT A. BLACKWOOD, III*
STEVEN G. BOLTON*
KAREN RAY BOSSMEYER*
DONALD W. BOYTON*
SYDNEY J. BUTLER
MAURICE A. BYRNE, JR.*
PAUL S. DAVIDSON
KENNETH R. DREHER*
DARRYL W. DURHAM*
JOHN E. EVANS*
WILLIAM S. GLADING
G. KENNEDY HALL, JR.*
JOSEPH L. HAMILTON*
W. LARRY HARRIS*
JOHN M. HIMMELBERG
RONALD E. JOHNSON*
C. DAVID JOHNSTONE*
JOHN S. KECK
W. DAVID KISER*
JAMES R. KNIFFEN*
MARY CHERYL MATHEIS
MARSHALL L. MATZ
PATRICK H. MOLLOY*
ALEXANDER J. PIRES, JR.
PAUL RAMPELL*

[illegible]
JEFFREY B. RITTER
ROGER B. SCHAGRIN
JAMES C. SEIFFERT*
JOHN F. SHERLOCK, III
THURMAN L. SISNEY*
JOHN L. SMITH*
NORA FRANCIS STONE*
ROBERT L. TEMPLETON*
JOHN R. WHITE*
WILLIAM C. WILLOCK, JR.*

RUFUS E. WILSON
OF COUNSEL

E

OFFICES IN
LOUISVILLE, KENTUCKY
PALM BEACH, FLORIDA
FRANKFORT, KENTUCKY
NASHVILLE, TENNESSEE
ASHLAND, KENTUCKY
JACKSON, MISSISSIPPI
ATLANTA, GEORGIA
NEW ALBANY, INDIANA

NOT ADMITTED DISTRICT OF COLUMBIA*

October 29, 1982

William T. Coleman, Jr., Esquire
O'Melveny & Myers
1800 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Coleman:

In a recent conversation with Sherman Unger, I learned inadvertently that the American Bar Association Standing Committee on Federal Judiciary had not yet acted upon his selection to be nominated to the United States Court of Appeals for the Federal Circuit. Mr. Unger told me that someone had apparently raised questions about him and that he was unsure of whom or what. He did not ask me to take any action.

I have thought about this for several days and must tell you that I am outraged at the position apparently taken by your Committee. Mr. Unger is a member of the Reagan Administration, chosen by that Administration, and they obviously are familiar with his qualifications relating to temperament, integrity and character.

This firm has long been involved in American Bar affairs. My partner, Marion Edwards Harrison, serves as a member at large on the Board of Governors. I believe that the American Bar should enthusiastically endorse Mr. Unger's nomination. I have known him both socially and professionally for a number of years and have the greatest respect for his ability, integrity, and temperament. I want to apprise you of my opinion and advise you that I am willing to support Mr. Unger's nomination politically, professionally, and any other way that could be of assistance, and urge you and your Committee to do the same.

Sincerely,

Bernard H. Barnett

BHB:bjs

cc: Brooksley E. Landau
Edward C. Schmults

[illegible]

STATE OF OHIO)
: SS.
COUNTY OF HAMILTON)

F

JERRY L. COWAN, being first duly cautioned and sworn, deposes and says:

(1) I am a partner in the Cincinnati law firm of Frost & Jacobs, and have been associated with that firm since 1956. I am a 1956 graduate of the University of Virginia School of Law and have been admitted to the Ohio Bar since that time.

(2) I have known Sherman E. Unger both socially and professionally since I have been associated with Frost & Jacobs. I have upon occasion represented Mr. Unger professionally. At no time during the period that I have known Mr. Unger would I describe him as having been distraught, despondent, or depressed.

(3) I have advised the Federal Bureau of Investigation and the American Bar Association that based upon the 25 years I have known Mr. Unger I believe he possesses a requisite intellectual competency, integrity, and temperament to be appointed to the Federal Judiciary.

FURTHER AFFIANT SAYETH NAUGHT.

Jerry L. Cowan
Jerry L. Cowan

SWORN to before me and SUBSCRIBED in my presence this 1st day of November, 1982.

Notary Public

[illegible] P. [illegible], Attorney at Law
NOTARY PUBLIC - STATE OF OHIO
My Commission has no expiration
[illegible] Section 147.03 R. C.

29 A

KEATING, MUETHING & KLEKAMP
ATTORNEYS AT LAW
18TH FLOOR PROVIDENT TOWER
ONE EAST FOURTH STREET
CINCINNATI, OHIO 45202
(513) 579-6400

JOHN L. MUETHING
D NALD P. KLEKAMP*
MY A. GARRY
P. KREIDER
R. GARDNER
MICHAEL J. BURKE*
LOUIS F. GILLIGAN
JOSEPH P. ROUSE
RICHARD D. SIEGEL
JOSEPH L. TRAUTH, JR.
JAMES R. WHITAKER
J. DAVID ROSENBERG*

WILLIAM J. KEATING
COUNSEL

RICHARD L. CREIGHTON, JR.
PAUL V. MUETHING
JEROME C. RANDOLPH
WILLIAM A. POSEY
WILLIAM J. KEATING, JR.
GENINA C. BOWMAN
MARK J. WEBER
KEVIN E. IRWIN
JAMES E. BURKE
GREGORY M. UTTER
ROBERT E. COLETTI
JAMES M. JANSING
SAMUEL J. SIMON
JOSEPH P. MELLEN

* ALSO ADMITTED TO
PRACTICE IN KENTUCKY

September 22, 1983

Direct Dial: 579-6421

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
U. S. Senate
Washington, D. C. 20510

Dear Mr. Chairman:

The undersigned supports the ppointment of Sherman Unger to the U. S. Court of Appeals for the Federal Circuit. By this letter and the attached Affidavit, I wish to make note of my support to the Committee on the Judiciary and trust that due note of the support and the contents of the Affidavit can be made known at the time of the hearing by the Committee on Mr. Unger's appointment.

Yours very truly,

JOHN L. MUETHING

pl

AFFIDAVIT

STATE OF OHIO)
(SS:
COUNTY OF HAMILTON)

JOHN L. MUETHING, being first duly cautioned and sworn, deposes and says:

(1) I am a partner in the law firm of Keating, Muething & Klekamp and have been so since 1955. Our firm has been and is counsel to American Financial Corporation in various legal matters including litigation.

(2) Gary P. Kreider has been associated with Keating, Muething & Klekamp since 1964, and has been a partner in this firm since 1973. Mr. Kreider has been involved in the representation of American Financial Corporation from time to time.

(3) I am familiar with the Affidavit executed by Mr. Kreider on May 24, 1978 which referred to certain events which allegedly occurred in August, 1972 involving Mr. Kreider and Sherman Unger.

(4) I am further aware that Mr. Kreider's Affidavit of May 24, 1978 was signed solely in connection with a highly contested complex litigation involving American Financial Corporation in which Mr. Unger had a part. As counsel for American Financial Corporation, I caused this Affidavit to be filed in the pending litigation.

(5) During the time since 1972 that Mr. Unger has practiced law in Cincinnati, Ohio, I have had on many occasions the opportunity to observe Mr. Unger and be aware of his legal work product, and have also acted as counsel in various litigated matters in which Mr. Unger served as lead counsel for the opposition. By reason of this knowledge and observation and notwithstanding my having caused the Affidavit previously mentioned to be filed, it is my opinion that Mr. Unger possesses the legal ability, the integrity, the personal temperament and judicial qualifications which qualify him for service to the Federal Bench.

Further affiant sayeth naught.

John L. Muething

John L. Muething

Sworn to and subscribed before me this 22nd day of September, 1983.

James E. Burke

Notary Public

JAMES E. BURKE, Attorney at Law
Notary Public, State of Ohio
My commission has no expiration date
Section 147.03 O. R. C.

B

AFFIDAVIT

STATE OF OHIO)
(SS:
COUNTY OF HAMILTON)

JOHN L. MUETHING, being first duly cautioned and sworn, deposes and says:

(1) I am a partner in the law firm of Keating, Muething & Klekamp and have been so since 1955. Our firm has been and is counsel to American Financial Corporation in various legal matters including litigation.

(2) Gary P. Kreider has been associated with Keating, Muething & Klekamp since 1964, and has been a partner in this firm since 1973. Mr. Kreider has been involved in the representation of American Financial Corporation from time to time.

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(4) I am further aware that Mr. Kreider's Affidavit of May 24, 1978 was signed in connection with a highly contested complex litigation involving American Financial Corporation in which Mr. Unger had a part.

(5) Since 1972, during the time that Mr. Unger practiced law in Cincinnati, Ohio, I have had on many occasions the opportunity to observe Mr. Unger and be aware of his legal work

product. I have served as opposing counsel in various litigated matters in which Mr. Unger served as lead counsel for the opposing side. The foregoing has afforded me ample opportunity to be familiar with his legal abilities and personal temperament and qualities. Based upon these observations, I believe Mr. Unger has the necessary temperament, training and experience for appointment to the Federal Bench.

Further affiant sayeth naught.

John L. Muething

Sworn to and subscribed before me this 30th day of December, 1982.

Notary Public

MARY A. GAGANIS
Notary Public, State of Ohio
My Commission Expires Oct. 15, 1987

C

U.S. Department of Justice
Office of the Deputy Attorney General

The Deputy Attorney General
Washington, D.C. 20530

September 27, 1983

The Honorable Strom Thurmond
Chairman, Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The purpose of this letter is to reaffirm the Department of Justice's support for the nomination of Sherman E. Unger to be a member of the Court of Appeals for the Federal Circuit. We are aware of the opposition of the Standing Committee on Federal Judiciary of the American Bar Association to the nomination of Mr. Unger and do not take it lightly. However, we have carefully reviewed the allegations contained in the letter of William T. Coleman to the Committee and have not found any evidence in support of those allegations sufficient to constitute a bar to Mr. Unger's confirmation. Indeed, we reviewed at length each of the allegations with representatives from the ABA.

Sherman Unger has served most ably and effectively in this Administration as general counsel of the Commerce Department. This distinguished public service weighed far more heavily with the Department of Justice than the largely anonymous allegations arising principally from highly controverted bankruptcy litigation which took place nearly a decade ago.

We urge the Senate Judiciary Committee to approve Sherman Unger's nomination. With warm regards.

Sincerely,

Edward Schmults

Edward C. Schmults
Deputy Attorney General

cc: Hon. Joseph R. Biden, Jr.
Secretary Malcolm Baldrige
✓ Sherman Unger
Fred Fielding

NBA

D

Reply to: Dennis W. Archer
Penobscot Building
40th Floor
Detroit, MI 48226

September 23, 1983

Dennis W. Archer
President

Arthenia L. Joyner
President-Elect

Frank Seales, Jr.
Vice President

Thomas J. Broome
Vice President

Dolores P. Wilson
Vice President

Leroy Wilson, Jr.
Vice President

Algenita Scott Davis
Secretary

Walter L. Sutton, Jr.
Treasurer

James R. Haynes
General Counsel

Elliott S. Hall
Parliamentarian

John Crump
Executive Director

The Honorable Strom Thurmond
Chairman, Committee on the Judiciary
The United States Senate
SD-224 Dirksen Senate Office Building
Washington, D.C. 20510

RE: Court of Appeals for the Federal Circuit
Nominee, Sherman E. Unger

Dear Senator:

The National Bar Association, founded in 1925, is the oldest and largest association of minority lawyers in this country. We have a professional interest in the appointment of any nominee to the Federal Bench and have on many occasions appeared before your Committee to address the issues of competence, judicial temperament, intellectual ability, trial experience, character and conduct, and commitment to equal justice of candidates nominated to serve on courts of this country. Several weeks ago members of the National Bar Association requested that we review the background and qualifications of Sherman E. Unger, Nominee, Court of Appeals for the Federal Circuit.

Unfortunately, the Office of the Attorney General no longer timely advises the National Bar Association of nominees and appears to work exclusively with the American Bar Association. As a result, unless there has been an early, expressed interest in a particular candidate to support the nomination, or to oppose the nomination, the National Bar Association has not been in a position to offer fully documented testimony on each nominee to appear before your committee. Such is the case with Sherman E. Unger whom we would like to support.

We are aware of the American Bar Association's Standing Committee on Federal Judiciary opposition to Mr. Unger's nomination. We are not able to rebut or agree with the information the American Bar Association relies upon giving rise to their opposition because of inadequate lead time to conduct our own full investigation.

We are, however, able to speak with confidence about Sherman Unger's commitment to equal justice and his attitude on racial and social issues.

The National Bar Association has long advocated that the availability of capable minority counsel is vital to minority economic and community development. Sherman Unger's actions as General Counsel of the Department of Commerce reflect a shared recognition of that linkage. He has taken the initiative to promulgate legal guidance to officials of the Minority Business Development Agency to permit its grant-funded business development organizations to include legal assistance on matters of commercial law among the professional and technical services provided to minority entrepreneurs and firms.

Where they have placed Black lawyers in "traditional" roles, Mr. Unger has assigned a Black attorney to the non-traditional role of counseling officials both on matters of U.S. - Japan trade policy and issues relating to U.S. direct and reverse international investment, including the negotiation of bilateral investment treaties.

Assistant Secretary of Commerce for Economic Development, Carlos C. Campbell, served with Mr. Unger in the Department of Housing and Urban Development during the first Nixon Administration. Mr. Campbell found Mr. Unger's integrity to be beyond reproach. As head of a "client agency", EDA, within Commerce, Mr. Campbell found Mr. Unger's temperment and discernment to be flawless, strongly supportive of efforts to promote responsive debt management, equal opportunity, and effective use of program resources. Mr. Unger has on numerous occasions, provided positive legal remedies to support Assistant Secretary Campbell in instances where subordinate counsel attempted to render subjective and inordinately restrictive opinions.

On Friday, September 23, 1983, I spoke with Richard W. Ward, past president of the Cincinnati Bar Association and a fellow member of the ABA House of Delegates. Mr. Ward informed me that he had been a member of the Cincinnati Bar Association Grievance Committee from 1956 - 1975 and continued since that time to be a member of an executive committee. Mr. Ward stated that there has never been a grievance filed against Sherman Unger at any time from 1956 to the present time (1983).

We are pleased to have this opportunity to provide information which we hope will be considered by this Committee in its deliberations on this nominee. Moreover, we request that this letter be made a part of the record of the confirmation proceedings.

Very truly yours,

Dennis W. Archer
President

DWA/yg

E

2500 TRUST COMPANY TOWER
ATLANTA, GEORGIA 30303
404/572-4600

September 7, 1983

Honorable Strom Thurmond
209 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Thurmond:

Some time ago President Reagan nominated Sherman Unger for a position on the newly created United States Court of Appeals for the Federal Circuit. I have known Mr. Unger for a long time and had planned to testify in his behalf as had a number of others.

I know that a reasonable time is needed to carry on an investigation of a nominee on behalf of the committee, particularly where the American Bar Association is opposing the nominee, but I would urge that Mr. Unger's nomination be placed on the calendar at an early date.

It would be bad for our country to have a nomination blocked simply for want of a hearing because the American Bar Association Committee is objecting to the nominee. They have no more rights than the rest of us and deserve no more than an opportunity to state their case against the nominee.

I know that you have a busy Fall in sight but I hope that you can get around to a hearing on this nomination during September.

Warm wishes.

Sincerely

Griffin Bell

Griffin B. Bell

bcc: Hon. Sherman Unger

UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
ASSISTANT SECRETARY AND COMMISSIONER
OF PATENTS AND TRADEMARKS
Washington, D.C. 20231

F

SEP 2 1983

Honorable Strom Thurmond
Chairman, Committee
on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

The purpose of this letter is to inform you of my strong personal support for the nomination of Sherman E. Unger as a judge on the Court of Appeals for the Federal Circuit.

I agree with my colleagues in the patent bar that because of the unique role that Court will play in the adjudication of patent cases nationwide and in the development of patent law, it should include among its members an appropriate number of qualified specialists in patent law. I do not believe, however, that each vacancy has to be filled with a patent lawyer.

I have had the pleasure of working with Mr. Unger in his role as the General Counsel of the Department of Commerce since each of us was confirmed by the Senate in the summer of 1981. I know Mr. Unger to be an able and diligent Federal attorney, with a distinguished background in private practice. In all of our efforts to improve the operations of the U.S. Patent and Trademark Office, Mr. Unger has been extremely supportive, showing a keen appreciation for the importance of strong and effective protection of intellectual property rights.

I would be pleased to testify in support of Mr. Unger before your Committee if you believe that would be helpful.

Sincerely,

Gerald J. Mossinghoff
Assistant Secretary and Commissioner
of Patents and Trademarks

G

NIEMAN, AUG, ELDER & JACOBS
ATTORNEYS AND COUNSELORS AT LAW
1000 ATLAS BANK BUILDING
524 WALNUT STREET
CINCINNATI, OHIO 45202-3177
(513) 621-8280

William H. Nieman
J. Vincent Aug
James L. Elder
Maurice W. Jacobs
Louis F. Lausche
John D. McClure
Henry E. Menninger, Jr.

September 9, 1983

Honorable Strom Thurmond
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am an attorney at law practicing in Cincinnati, Ohio. I am admitted to practice before the Courts of Ohio, the United States District for the Southern District of Ohio, the United States Court of Appeals for the Sixth Circuit and the Supreme Court of the United States. I am a life member of the Judicial Conference of the Sixth Circuit and for several years, have been an adjunct professor of law at the University of Cincinnati, College of Law, teaching Debtor-Creditor law.

I am writing this letter in support of the nomination of Sherman E. Unger as a United States Circuit Judge for the Federal Circuit. I have been advised that a question has arisen regarding two affidavits executed by Mr. Unger, which affidavits were filed with the United States Bankruptcy Court for the Southern District of Ohio, Western Division. One affidavit was filed in the matter of Unit, Inc., proceedings under Chapter XI of the Bankruptcy Act, pending as Case No. B-1-75-1989. The other was filed in the matter of Scioto Park, Ltd., proceedings under Chapter XII of the Bankruptcy Act, then pending as Case No. B-1-75-2321.

Mr. Unger and I were engaged as co-counsel in both of those proceedings. I was engaged specifically because of my extensive experience in bankruptcy law and my number of years of practice before the Bankruptcy Court in Cincinnati. I prepared each of the affidavits in question.

The language contained in each "I am not related not [sic] do I have any relationship to the Debtor . . ." was used by me to connote a lack of blood relationship between Mr. Unger and the principals of the Debtor entities. Unit, Inc. was a corporation and Scioto Park, Ltd. was a limited partnership.

At that time, Mr. Unger held no stock interest in Unit, Inc., nor was he serving as an officer, director, or employee of that corporation. However, Mr. Unger did hold a limited partnership interest in Scioto Park, Ltd.

It is my recollection that Mr. Unger's interest in Scioto Park, Ltd. as a limited partner was disclosed to the Creditors and to the Court in the Schedules and Statement of Affairs in that proceeding. The failure to reference this interest in the affidavit which I prepared and Mr. Unger signed was not intended in any way to deceive either the Court or the Creditors. Parenthetically, I note that a limited partnership interest is an investment only. Limited partners have no right to control the operation of the partnership, or the partnership's business. In that respect, a limited partnership interest is analagous to the ownership of stock in a corporation. It is my recollection that Mr. Unger's interest was minimal -- approximating 2%.

In those affidavits, Mr. Unger also stated "nor do I have any interest adverse to the Debtor's estate." With respect to Scioto Park, it was, and is, my opinion that the interest of a limited partner and that of a general partner is not adverse but the same, for the viability of the partnership is the goal of a Chapter XII proceeding and the rehabilitation contemplated by Chapter XII inures to the benefit of both general partners and limited partners alike.

Mr. Unger's interest in Scioto Park was the subject of discussion before the Court. The late Bankruptcy Judge of that Court, the Honorable Leonard Gartner, was fully aware of Mr. Unger's interest, but felt that the best interest of the proceeding were served by Mr. Unger serving as counsel for the Debtor in that case. In view of the disclosures which Mr. Unger made to the Court and to the Creditors regarding his minor interest in Scioto Park, Ltd., I can state with assurance that the omission of a recital of such interest in the affidavit which I prepared did not carry even the slightest implication of intent on the part of Mr. Unger to improperly influence the proceeding. I can further state that the Court was in agreement with that view and that no party or creditor in that proceeding was prejudiced.

In conclusion, Senator, I have known Sherman Unger for a long time and have worked with him professionally in the past. I consider him to be a person of high integrity and would have no hesitation in relying upon his word in any future dealing between us. I believe that Mr. Unger would be a valuable asset to the judiciary of the United States and strongly support his nomination. Moreover, I am anxious to appear before your Committee to testify on Mr. Unger's behalf and accordingly request arrangements be made for my testimony.

I hope this letter has cleared up any questions you or your staff may have had with respect to the affidavits in question. If not, please do not hesitate to contact me with respect to any further particulars.

Very truly yours

J Vincent Aug

J. Vincent Aug

H

LAW OFFICES
BARNETT & ALAGIA
1000 THOMAS JEFFERSON STREET
WASHINGTON, D.C. 20007
(202) 342-0342
TELECOPIER (202) 775-9069
CABLE ALBAR
TELEX 89-2445

HUGH SCOTT
PARTNER

OFFICES IN
LOUISVILLE KENTUCKY
PALM BEACH FLORIDA
FRANKFORT KENTUCKY
NASHVILLE TENNESSEE
JACKSON MISSISSIPPI
ATLANTA GEORGIA
NEW ALBANY INDIANA

September 15, 1983

PERSONAL

The Honorable Strom Thurmond
Chairman, Senate Judiciary Committee
Room SD-224
Washington, D. C. 20510

Dear Strom:

I understand that the hearing on the nomination of Sherman E. Unger, Esquire for the U.S. Court of Appeals for the Federal Circuit is scheduled for 2:00 p.m. on Wednesday, September 28th.

I respectfully request that I be permitted to testify as one of the lead off witnesses in support of Mr. Unger's nomination.

With best personal regards,

Yours cordially,

Hugh Scott

HS/sho
cc: Robert J. Short, Esquire
bcc: Bernard H. Barnett, Esquire ✓

THE SECRETARY OF COMMERCE
Washington, D.C. 20230

May 5, 1983

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Strom,

As you know, Sherman Unger, my General Counsel, has been nominated to the United States Court of Appeals for the Federal Circuit. I understand there is some opposition to Unger but I know that these matters have been carefully considered by the Department of Justice and the White House and found wanting.

From everything I can gather, the opposition is centered on relatively minor points of conduct occurring a good many years ago. It does seem to me the main opposition is because Unger, when he was in private practice, was a very aggressive and successful lawyer who won most of his cases and ruffled some feathers along the way. He is a real fighter and does not give up. I can honestly support him and desire to testify to that effect at his confirmation hearing.

I did not know Unger until I chose him as General Counsel two years ago, but I have worked very closely with him since. He has been right every time on some very complicated issues. He is very smart, very tough, and has been trained in most of the issues that will come before this court.

Unger has done an outstanding job as a member of this Administration, and is a loyal, hard working and efficient team player.

Sincerely,

Mac

Malcolm Baldrige
Secretary of Commerce

HAMEL, PARK, McCABE & SAUNDERS
888 SIXTEENTH STREET, N.W.
WASHINGTON, D.C. 20006

J

May 26, 1983

The Honorable Strom Thurmond, Chairman
Committee of the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The President has nominated Sherman E. Unger of Ohio to be a member of the Court of Appeals for the Federal Circuit. I understand your committee will shortly hold a hearing on this nomination, and I would appreciate it if I might appear in person to testify on Mr. Unger's behalf.

I am told that a committee of the American Bar Association has withheld its endorsement from Mr. Unger. That being so, I think it would be useful if some of us who have known Mr. Unger a long time -- and know his fitness for this high judicial appointment -- could share our views with your committee, so you can make a well informed judgment on his confirmation.

I have know Mr. Unger over 25 years, and we are good friends. I know his high competence as a lawyer, for we have been co-counsel, and my office was his Washington business office while he practiced law in recent years in Cincinnati, Ohio. I know from first-hand acquaintanceship his high standards of personal and professional integrity. I know also from many years his total suitability for service on the Federal Bench. A mature professional now in his fifties, he offers the Court an outstanding blend of experience, energy, thoroughness and a deep sense of fairness. I know his habits, his demeanor and his temperament, and in my view he will be an outstanding judge.

Finally, as to my credentials to comment -- apart from my close knowledge of this nominee. I've been a practicing attorney in Washington since 1946. I have been a Congressional Committee counsel, White House Counsel to President Eisenhower, a White House consultant for Presidential transition, and the recipient of six appointments to four separate assignments by four different Presidents. In light of this general experience, I hope I can modestly claim some knowledge not only of how our governmental system should work, but also of the need for very high standards in its appointees if government is truly to serve the public interest and merit public confidence.

If I may be permitted to testify on behalf of Mr. Unger's nomination, I would appreciate it if your staff could let me know the hearing date, and whether any additional advance information is needed from me.

Respectfully,

Edward A. McCabe

EAM/skl

K

WILMER, CUTLER & PICKERING
1666 K STREET, N. W.
WASHINGTON, D. C. 20006

CABLE ADDRESS: WICRING WASH, D. C.
INTERNATIONAL TELEX: 440-239
TELEX: 89-2402
TELEPHONE 202 872-6000

LLOYD N. CUTLER
DIRECT LINE (202)
872-6100

EUROPEAN OFFICE
1 COLLEGE HILL
LONDON, EC4R 2RA, ENGLAND
TELEPHONE 01-236-2401
TELEX: 851 883242
CABLE ADDRESS: WICRING LONDON

May 9, 1983

The Honorable Strom Thurmond
Chairman, Committee on the Judiciary
United States Senate - Room 2226DSOB
Washington, D.C. 20520

Dear Mr. Chairman:

I understand that Sherman Unger, Esquire, has been nominated by President Reagan to serve on the United States Court of Appeals for the Federal Circuit.

I have known and worked with Mr. Unger during the past two years of his service as General Counsel of the Department of Commerce. I have a high opinion of his character, integrity and ability, and I would like the opportunity to testify on his behalf.

Can you please let me know when the Committee plans to hold hearings on Mr. Unger's nomination and whether I can be scheduled as a witness.

Sincerely,

Lloyd N Cutler

Lloyd N. Cutler

cc: Mr. Robert J. Short

2500 TRUST COMPANY TOWER
ATLANTA, GEORGIA 30303
404/572-4600

L

May 5, 1983

Honorable Strom Thurmond
Chairman, Senate Judiciary Committee
Washington, D.C. 20510

Re: Sherman Unger

Dear Senator Thurmond:

I understand that President Reagan has nominated Honorable Sherman Unger to be a judge on the United States Court of Appeals for the Federal Circuit.

I would like to testify in favor of Mr. Unger at such time as a hearing is held on his nomination. I know him well and have been associated with him as a lawyer.

All good wishes.

Sincerely,

Griffin Bell

Griffin B. Bell

cc: Honorable Robert C. Byrd

bcc: Sherman Unger, Esq.

BAUER, MORELLI & HEYD CO., L.P.A.
ATTORNEYS AT LAW
303 EXECUTIVE BUILDING
35 EAST SEVENTH STREET
CINCINNATI, OHIO 45202
PHONE 241-5870

NICHOLAS BAUER
ARNOLD MORELLI
GERALD O. HEYD
[illegible] A. KRUSE
JAMES P. EDMISTON

M

January 3, 1983

Senator Strom Thurmond
Chairman of U. S. Senate Committee
on the Judiciary
Room 2226
Dirksen Senate Office Building
Washington, D. C. 20515

Dear Senator Thurmond:

I am sending this letter to you as a recommendation in favor of the nomination of Sherman Unger as a U. S. Circuit Judge for the Federal Circuit. I have known Sherman for better than thirty years now. My recommendation is based on our working on legal matters together and against each other, as well as socializing together. I have come to respect his exceptional intelligence, first-rate integrity and excellent temperament. I have always been impressed with his judgment and tenacity. I think he would make a first-rate judge and would have the impartial temperament related thereto. Any senator voting for him could feel satisfied that he would be doing a favor to any Court that Sherman would serve on.

There is one disturbing note that I find in this matter. My name was given to the American Bar Association as a source of information, and I was never contacted by the ABA. I am concerned about the political implications of that failure to contact me.

In summary, I strongly recommend that your Committee come out with a favorable vote for Sherman Unger.

Sincerely,

Arnold Morelli

AM:hp

cc: Senator Joseph R. Biden

bcc: Sherman Unger, Esq.

RECEIVED N
OFFICE OF THE
GENERAL COUNSEL
JUL 22 3 47 PM '83

Drew, Ward & Graf Co. L. P. A.
Attorneys at Law
24th Floor-Central Trust Tower
Fourth and Vine Streets
Cincinnati, Ohio 45202
(513) 621-8210

Geo [illegible] Raymond Drew
Ric [illegible] Ward
Wil [illegible] Graf
Rich [illegible] P. Voss
Counsel
William J. Schmid
Theodore K. [illegible]

July 15, 1983

Senator Strom Thurmond
Chairman of the United States
Senate Committee on the Judiciary
Dirksen Senate Office Building
Washington, D.C. 20510

Re: Sherman E. Unger

Dear Senator Thurmond:

This note is in response to requests from Sherm and several other Cincinnati attorneys that I relate to you some knowledge and opinions I possess which may be helpful to you in connection with Sherm's nomination to the federal bench.

I have known Sherm for more than thirty years as a college fraternity brother (although different schools) and a practicing lawyer in Cincinnati. I was a member of the Cincinnati Bar Association Grievance Committee for 19 years, from 1956 to 1975, and during that period of time I am quite certain that he never came before the Committee for any ethical violations or any complaints of any sort. I was on the Executive Committee of the Cincinnati Bar Association for another five years and was President of that organization in 1977, during which time, I further confirmed, there were no occasions for his name to come before either the Grievance Committee or the Executive Committee. I am currently, and have been since 1978, the Cincinnati Bar Association Delegate to the American Bar Association. In that capacity, I sit with the Executive Committee at their luncheon meetings twice a month and keep tabs on what is happening in the Cincinnati Bar Association including grievance matters. I have personal knowledge that, from 1956 to date, no complaint has ever been filed against him with the Cincinnati Bar Association.

A number of years ago, Sherm's first wife retained me and I represented her in a divorce proceeding in which there was no acrimony or unpleasantness. Sherm made a very decent settlement under the circumstances, and since that time has voluntarily continued to increase her alimony payments and has made several gifts to her of stock so that she could keep pace with inflation and maintain her standard of living. I suggest that this has been rather generous on his part. I have not seen any of my other former clients treated in that same fashion in some 34 years of practice.

In my opinion, Sherm is a very competent attorney and a person of considerable integrity. I cannot agree with the ABA Committee on the Federal Judiciary which failed to endorse him. I believe he would make an excellent judge.

Incidentally, a few years back, 1951 to unearth ancient history, I was a pilot in the Air Force Reserve and our wing was called to active duty. We were spread around and I landed in your state, at Donaldson Air Force Base. We were there about eighteen months and made many good friends at church, through the local bar association and in our neighborhood. We still keep in touch with several of them.

Sincerely,

Richard H Ward

Richard H. Ward

DREW, WARD & GRAF CO. L. P. A.
ATTORNEYS AT LAW
24TH FLOOR-CENTRAL TRUST TOWER
FOURTH AND VINE STREETS
CINCINNATI, OHIO 45202
—
(513) 621-8210

[illegible] Raymond Drew
[illegible] Ward
[illegible] Graf
[illegible] Voss

Counsel
William J. Schmid
[illegible] K. High

RECEIVED
OFFICE OF THE
GENERAL COUNSEL
JUL 22 3 47 PM '83

July 15, 1983

Senator Howard Metzenbaum
Room 347
Russell Senate Office Building
Washington, D.C. 20510

Re: Sherman E. Unger

Dear Senator Metzenbaum:

This note is in response to requests from Sherm and several other Cincinnati attorneys that I relate to you some knowledge and opinions I possess which may be helpful to you in connection with Sherm's nomination to the federal bench.

I have known Sherm for more than thirty years as a college fraternity brother (although different schools) and a practicing lawyer in Cincinnati. I was a member of the Cincinnati Bar Association Grievance Committee for 19 years, from 1956 to 1975, and during that period of time I am quite certain that he never came before the Committee for any ethical violations or any complaints of any sort. I was on the Executive Committee of the Cincinnati Bar Association for another five years and was President of that organization in 1977, during which time, I further confirmed, there were no occasions for his name to come before either the Grievance Committee or the Executive Committee. I am currently, and have been since 1978, the Cincinnati Bar Association Delegate to the American Bar Association. In that capacity, I sit with the Executive Committee at their luncheon meetings twice a month and keep tabs on what is happening in the Cincinnati Bar Association including grievance matters. I have personal knowledge that, from 1956 to date, no complaint has ever been filed against him with the Cincinnati Bar Association.

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In my opinion, Sherm is a very competent attorney and a person of considerable integrity. I cannot agree with the ABA Committee on the Federal Judiciary which failed to endorse him. I believe he would make an excellent judge.

Sincerely,

Richard H Ward

Richard H. Ward

RHW/tl

Superior Court of the District of Columbia
Chambers of Judge William S. Thompson

P

August 26, 1983

The Honorable Strom Thurmond
United States Senator from South Carolina
Chairman, Senate Judiciary Committee
SR-218
Washington, D.C. 20510

Dear Senator Thurmond:

It is with profound personal and professional pleasure that I recommend a fellow Republican, Sherman E. Unger, Esq., General Counsel, United States Department of Commerce, for confirmation as a judge on the United States Court of Appeals for the Federal Circuit. The Honorable Ronald W. Reagan has nominated Mr. Unger for this position, and this letter is in support of the nominee.

Mr. Unger has been personally well-known to me for over twenty years. We first met when I volunteered to be Co-Chairman with Charles S. Rhyne, Esq., for Lawyers for The Honorable Richard M. Nixon who was a candidate for the President of the United States. Our association continued as members of the World Peace Through Law Center. He served on the Planning Committee while I was Secretary-General and Secretary-Treasurer. During the last twenty-odd years, I have observed his rapid ascent from a private practioner of law, concentrating in complex litigation, to the following positions in our government:

- General Counsel of the United States Department of Housing and Urban Development
- General Counsel of the Government National Mortgage Association,
- Member of the Administrative Conference of the United States,
- Member of the Office of Economic Opportunity, National Advisory Committee for Legal Services Program
- Judge Advocate in the U.S. Air Force

Mr. Unger is keenly intelligent, strongly self-disciplined, and well-motivated. He is highly respected among the Bench and the Bar. He has superior communication skills which have been demonstrated in both public and private sectors. He has earned the reputation of a person with a strong emotional makeup who possesses leadership abilities and who can relate easily in all situations.

Senator Thurmond, I strongly urge you and your committee to confirm Mr. Unger who, in my opinion, is exceptionally well-qualified for the position for which he has been nominated by our President.

Finally, I express my thanks again for your support of me when I was nominated for Associate Judge of the then Court of General Sessions for the District of Columbia. Your endorsement assisted the Committee in unanimously confirming me fifteen years ago. I will always remain grateful to you.

Sincerely,

William S. Thompson

WILLIAM S. THOMPSON
Associate Judge, Superior Court
for the District of Columbia

cc:

The Honorable William French Smith
Attorney General

Q

Superior Court of the District of Columbia
Chambers of Judge William S. Thompson
August 26, 1983

The Honorable William French Smith
Attorney General
United States Department of Justice
Washington, D.C. 20530

Dear Mr. Attorney General:

It has recently been brought to my attention that Sherman E. Unger, Esq., General Counsel, United States Department of Commerce, has been nominated by The Honorable Ronald W. Reagan for a judgeship on the United States Court of Appeals for the Federal Circuit. This letter is in support of the nominee, a fellow Republican.

Mr. Unger has been personally well known to me for over twenty years. I first met him when I voluntarily agreed to serve with Charles S. Rhyne, Esq., as Co-Chairman for Lawyers for the Honorable Richard M. Nixon when he was a candidate for the presidency of the United States. Mr. Unger and I served together on the World Peace Through Law Planning Committee from approximately 1960 to 1965 during which time I held the position of Secretary-General and Secretary-Treasurer. Mr. Unger still maintains his membership in this international peace organization.

Our long-time friendship and association has afforded me an opportunity to follow his career in the private practice of law and his service to our Government as General Counsel of the United States Department of Housing and Urban Development; General Counsel of the Government National Mortgage Association; a member of the Administrative Conference of the United States, and many other high-level positions in the United States Government. Mr. Unger performed his duties as a trial lawyer, Judge Advocate and the government positions listed above in a professional manner, always showing impartiality, high legal ability, and scholarship.

Mr. Unger has earned a reputation as a self-starting, even-tempered, take-charge individual who has exceptional administrative capabilities. He reacts expertly and with unusual adroitness under high-pressure situations.

I would rate the nominee as being exceptionally well-qualified for the position as Judge on the United States Court of Appeals for the Federal Circuit. I strongly support him for the position. Finally, his Republican credentials are in good order.

Very truly yours,

William S. Thompson

WILLIAM S. THOMPSON
Associate Judge, Superior Court
for the District of Columbia

WST;bjw
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INTENTIONAL
BLANK

R

MANLEY, JORDAN & FISCHER
A LEGAL PROFESSIONAL ASSOCIATION

ROBERT E. MANLEY
JOSEPH H. JORDAN
TIMOTHY A. FISCHER
TIMOTHY M. BURKE
ANDREW S. LIPTON
JEFFREY J. HARMON

4300 CAREW TOWER
CINCINNATI 45202
(513) [illegible]

COUNSEL
WILLIAM A. McCLAIN

14 January 1983

Honorable Members
of the Senate Judicial Committee

Honorable Sirs:

It is my understanding that Sherman E. Unger, Esquire, has been nominated by President Ronald A. Reagan to be a judge of the Federal Court of Appeals and that this nomination is pending before your committee for the appropriate action.

As a senior at the University of Cincinnati Law School, Mr. Unger was a part-time law clerk under my supervision in the office of City Solicitor, Cincinnati, Ohio, where I served at the time as Chief Trial Counsel. Since that time, and during his entire professional, civic and political career, I have been a very close friend of Mr. Unger. As a matter of fact, I was instrumental in getting him his first job with the law firm of Frost & Jacobs where he eventually became a partner.

His legal skills have not only been ably demonstrated as a practioner, but also in his tours of duty as General Counsel for the U.S. Department of Housing and Urban Development and presently the General Counsel for the United States Department of Commerce. I personally can attest to his competence as a lawyer and his high standards of personal and professional integrity.

In my view, he has an excellent judicial temperament and I strongly recommend the nomination of Mr. Unger for your approval.

Respectfully yours,

William A McClain
William A. McClain

WAM/rmp

S

Clermont County
COURT OF COMMON PLEAS
BATAVIA, OHIO 45103

LOUIS J. SCHWARTZ
JUDGE

PHONE 732-7102 OR
732-7103

May 10, 1983

Honorable Strom Thurmond
President Pro-Tempore
United States Senate
347 Russell Building
1st and C. Streets, N.E.
Washington D.C. 20510

Dear Senator Thurmond:

Although I do not know you personally, nor am I a resident of South Carolina, I would like to inform you of the qualifications of Sherman E. Unger, who will be considered by you, your committee and members of the Senate for an appointment as a Federal Judge, Court of Appeals of the Federal Circuit.

I have known Mr. Unger for thirty-three years. During this period of time I have found him to be an excellent student, an outstanding trial lawyer, and highly respected by his peers. I am certain that Mr. Unger has the experience, knowledge and fairness to become a highly competent Judge.

In following your career, I have great respect for your courage and your firmness, particularly as it pertains to our military affairs. In World War II I was a member of the 13th and 82nd Airborne Divisions. It is my understanding that you were affiliated with the 82nd.

I served as a Reserve and Regular Army officer for several years.

My judicial experience is of nineteen years, and I will assure you that I would not recommend anyone to be a Federal Judge lightly.

Respectfully,

Louis J. Schwartz
Louis J. Schwartz

LJS:dj

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WHITE, GETGEY & MEYER CO., L. P. A.
ATTORNEYS AT LAW
THE ADAM RIDDLE HOUSE
2021 AUBURN AVENUE
CINCINNATI, OHIO 45219

ALVIN EUGENE WHITE
JOHN I GETGEY JR
RONALD A MEYER
WILLIAM M WADE JR
MICHAEL L GAY
CHARLES M STEPHAN
C. DAVID EWING

TELEPHONE
(513) 241-3685

May 26, 1983

Senator Howard Metzenbaum
Room 363
Russel Building
Washington, D.C. 20510

Dear Senator Metzenbaum:

This correspondence is being written to you because of the unfortunate criticism that has arisen from the potential appointment of Mr. Sherm Unger as a Federal Judge of The Court of Appeals. Since Mr. Unger is an Ohioan it is my belief that your office should provide special consideration to this matter, so that a favorable result is attained.

From the standpoint of recitation of qualities of Mr. Unger I am confident that your portfolio hereon adequately provides the same. Additionally, since I have known Mr. Unger since our days together at the Alfonse Taft College of Law, at the University of Cincinnati, I can only reaffirm all of the qualities that have been so evident within this individual, throughout his professional career, and which, collectively, did result in his consideration as a nominee. However, and in light of the opposition that is being amassed, in advance of the hearings, I thought it proper to express the views of one who has known this gentleman throughout his entire adult life.

Thank you.

Respectfully yours,

Alvin Eugene White
ALVIN EUGENE WHITE

AEW/sll

bcc Mr. Sherm Unger

U

WHITE, GETGEY & MEYER CO., L.P.A.
ATTORNEYS AT LAW
THE ADAM RIDDLE HOUSE
2021 AUBURN AVENUE
CINCINNATI, OHIO 45219

ALVIN EUGENE WHITE
JOHN T. GETGEY JR.
RONALD A. MEYER
WILLIAM M. WADE JR.
MICHAEL L. GAY
CHARLES M. STEPHAN
C. DAVID EWING

TELEPHONE
(513) 241-3685

May 26, 1983

Senator John Glenn
Room 503
Hart Building
Washington, D.C. 20510

Dear Senator Glenn:

This correspondence is being written to you because of the unfortunate criticism that has arisen from the potential appointment of Mr. Sherm Unger as a Federal Judge of The Court of Appeals. Since Mr. Unger is an Ohioan it is my belief that your office should provide special consideration to this matter, so that a favorable result is attained.

From the standpoint of recitation of qualities of Mr. Unger I am confident that your portfolio hereon adequately provides the same. Additionally, since I have known Mr. Unger since our days together at the Alfonse Taft College of Law, at the University of Cincinnati, I can only reaffirm all of the qualities that have been so evident within this individual, throughout his professional career, and which, collectively, did result in his consideration as a nominee. However, and in light of the opposition that is being amassed, in advance of the hearings, I thought it proper to express the views of one who has known this gentleman throughout his entire adult life.

Thank you.

Respectfully yours,

Alvin Eugene White
ALVIN EUGENE WHITE

AEW/sll

bcc Mr. Sherm Unger

V

FROST & JACOBS

2500 CENTRAL TRUST CENTER
201 EAST FIFTH STREET
CINCINNATI, OHIO 45202
TELEPHONE (513) 651-6800
CABLE ADDRESS "FROSTJAC"
TELEX 21-4390 F&J CIN
TELECOPIER (513) 651-6888

400 FIRST NATIONAL BANK BLDG.
MIDDLETOWN, OHIO 45042
TELEPHONE (513) 423-2001

1300 THIRD STREET SOUTH
NAPLES, FLORIDA 33940
TELEPHONE (813) 261-0582

[illegible]

MIDDLETOWN OFFICE
BARRY J. LEVEY
THOMAS A. SWOPE
DONALD L. CRAIN
COUNSEL
ELLIOTT D. LEVEY
WILLIAM R. BAILEY

[illegible]

PATENT, TRADEMARK AND
COPYRIGHT ATTORNEYS
[illegible]
SENIOR PARTNERS
[illegible]
COUNSEL
[illegible]

NAPLES OFFICE
** CARL E. WESTMAN
** JOHN M. PASSIDOMO

* ADMITTED IN NEW YORK ONLY
** ADMITTED IN FLORIDA ONLY

July 6, 1983

Honorable Howard Metzenbaum
347 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Metzenbaum:

As a member of the Senate Judiciary Committee you will have a special concern with the nomination of Sherman E. Unger to the newly constituted United States Court of Appeals for the Federal Circuit. Because of my past association with the candidate I feel equipped to comment on his qualifications.

For more than twelve years, from the time Unger graduated from law school until his appointment as general counsel for HUD, he was associated with this firm. At that time we rotated young associates through various departments of the firm or substantive areas of civil law before letting them specialize. Unger was of special assistance to me in my federal tax practice during rotation and later in trial matters which became his specialty.

When I was managing partner of this, a major Cincinnati law firm, Unger was an effective and capable partner. By training, experience, ability and intelligence he is, in my opinion, well qualified to serve as a member of the federal judiciary. After leaving this firm he has served with distinction as general counsel for two cabinet officers and founded and led a successful law firm of his own. I feel this has confirmed my opinion of his abilities. I do not mean to suggest that he is specially qualified in patent or trade-mark law, but he is very well qualified in the other areas over which the new court has jurisdiction.

Honorable Howard Metzenbaum
July 6, 1983
Page 2.

It is my understanding that your Committee has been apprised of a federal income tax assessment against Mr. Unger for the year 1968. Although Unger was no longer associated with our firm when the assessment was made, my partner, Jerry Cowan, and I handled that matter. For what we believe were politically motivated reasons both our firm and Mr. Unger were subjected to a special audit by the Intelligence Division of the Internal Revenue Service. All that the Special Agent found was that the firm and Unger were blameless and no action was recommended. The deficiency assessment was also disposed of to Unger's entire satisfaction. Aside from minor adjustments on standard issues which were readily conceded, the major issue was not only settled without tax cost to Unger but also on a basis which improved his position economically.

In addition to the legal qualifications of the nominee, I have kept in touch with him and his family and mutual friends over the years. As a result I feel that I know the human and I might add humane side of the man. He has, in my opinion, the blend of strength and firmness with compassion and understanding desirable in a member of the judiciary. Obviously, I hope you will support his confirmation.

Very truly yours,

W. R. Seaman

William R. Seaman

WRS:rf

Bcc: S. E. Unger, Esq.

UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
Address: COMMISSIONER OF PATENTS AND TRADEMARKS
Washington, D.C. 20231

W

JAN 26 1983

Sherman E. Unger, Esq.
General Counsel
Department of Commerce
Washington, DC 20230

Dear Sherm:

I am pleased to endorse wholeheartedly your nomination as a judge on the newly established Court of Appeals for the Federal Circuit.

As you know, while the law establishing that Court was pending in the Congress, I strongly supported its enactment. I firmly believe that over the next several years a single appellate court for patent cases nationwide will develop a definition of patentability which will be understandable to patent attorneys and business executives alike.

I agree with most of the spokesmen of the patent bar that the new Court should contain an appropriate mix of judges with background and experience in patent law. On the other hand, the Court is not a single-purpose court; it has far-reaching jurisdiction over many critically important areas including Federal procurement, trade issues and general Federal administrative matters such as personnel controversies.

Given your experience as General Counsel of HUD and most recently as the General Counsel of the Department of Commerce, I believe you are uniquely qualified for appointment to the Court. I have very much enjoyed working with you these past two years, and I appreciate your strong support for our efforts to strengthen the systems of law to protect inventions and other forms of intellectual property.

If there is anything I can do to assist during the nomination process, please let me know.

Sincerely,

Gerry M.

Gerald J. Mossinghoff
Commissioner of Patents and Trademarks

Mr. UNGER. From then on, I really believe my contact with the matter ended, and I would appreciate an opportunity to get into my rebuttal.

Senator HATCH. Go ahead.

Mr. UNGER. I have tried in my statement, that I prepared today to respond to what I consider to be the more important concerns that have been raised by the ABA. I have also tried to put into this document the other documents in evidence that support my position. I have tried to put them together in one book because I recognize that in 5 days we have gathered an awful lot of pieces of paper, a number of which have been mislaid or lack numbers and have not been able to be readily identified and retrieved.

I started my statement with a preface, and in that preface, I have taken the liberty of referring to the ethical consideration that attaches to comments on judges and perspective judicial appointees, and without spending a great deal of time on it, I would point out that I have sat here for 5 days and listened to some rather intemperate and abusive language about me that probably falls short of the standard of Ethical Consideration 8-6.

I would also point out that that ethical consideration requires that anyone publicly complaining be certain of his complaint, that petty criticisms should be avoided and that motivation of criticisms should be explored.

I also point out disciplinary rule 1-103 which suggests that if anybody has any knowledge of any breach of disciplinary rules. he has an absolute duty to report that to the bar association and see that it is pursued, and in the hearings that we have here, I now have charges dating back to 1959 without any such proceeding.

The most serious charge made against me consists of allegations by Mr. Coleman, representing the ABA, and Mr. Welsh, whose statement was adopted and introduced into the record, which suggested I suborned a judge by an ex parte contact with him concerning a case in which I was counsel.

During his testimony, Mr. Coleman suggested the existence of ex parte contacts other than a single incident the ABA asserted in its submission to the jury. I will leave my footnotes out, but these comments are footnoted and they are available.

He argued in the ABA submission that his testimony imposes on the committee a duty to investigate complaints of unidentified attorneys in unspecified cases who alleged "ex parte" contacts by me.

Now, on October 5, Mr. Coleman submitted to the committee Mr. Welsh's written statement that asserted Mr. Welsh's, and I quote, "suspicion" that a relationship existed between Judge Gartner and me that presumes outright bribery of Judge Gartner by me in return for favorable judicial rulings on fee applications and the merits of the case that appeared before him. This statement of suspicion is both unfounded and totally incompatible with the ethical considerations of 8-6 which is made a part of the exhibit here.

This reckless and intemperate language of Mr. Welsh's statement does much to explain Mr. Moore's characterization of his conduct during the litigation that Mr. Welsh and I contested.

Now, I want to talk about the ex parte issue. I know that it is in everyone's interest but I want to make a preliminary statement here if I may. The man that President Reagan has asked you to confirm to sit on the U.S. Court of Appeals is 56 years old. He is sitting here in front of you today. He has been in this administration over 2½ years. He has worked with people under pressure. They have had an opportunity to observe him day by day. There are other counsel that have offered contemporaneous observation of my temperment, of my integrity, and of my ability. They were under the 3-minute rule. Their statements are attached and are available.

I point out to you, also, since the ABA thought it appropriate to bring it up, that I am not asking for any sympathy or any pity. But in the last 14 months, I have been on a paper chase; chasing allegations that have not surfaced before this committee, digging through ancient files, finding pieces of paper, responding to then anonymous accusers about anonymous charges.

I had to figure out what the charge was and then who was making the charge and then somehow disprove it without ever knowing who, what or where I was going.

During that same period of time, I went through a bout with cancer, and I sit here by the grace of God. I ask nothing special for that but I point out to you that such an experience and the experience of chasing the ABA papers tempers a man, and the man who is sitting here who you are asked to confirm today may not be the same man that in 1959 was accused of something or in 1969 had a policy disagreement with Secretary Romney. I will point out that Secretary Romney and I had policy disagreements. He did not see me as a team player.

Secretary Baldrige has testified that he sees me as a team player. People change. Events change people, and with that statement, I want to go forward and talk about the ex parte involvement.

I was called to Judge Gartner's chambers. I was called to Judge Gartner's chambers because Jay Rosenberg brought an order outside of the record, hoping to influence Judge Gartner and have a trustee appointed in the Unit, Inc. application.

As I have said earlier, and I will repeat again, it is something I did not initiate. I did not give him the order, and I did not ask for the hearing. When I did come, Judge Gartner was concerned about the conduct of Unit, Inc., whether it had, in fact, diverted funds, whether it properly should be a debtor in possession or whether there should be a trustee appointed.

He went from that to a discussion of the assets that he properly saw before him, which was 71 percent of the Farmer's Bank Building and a $2,500 a month management fee and what was going to happen to the debtor in possession.

My statement to him, after being grilled by him, and these are his words, "for over an hour on what was going on in Wilmington," I explained to him how the funds had been diverted by one of the limited partners, and what had happened. His statement was, "What do we do now?" And I said, "I have no idea what we do. The only thing I can think of is you could reconsider your earlier order not to consolidate." I considered that a procedural suggestion.

We did not talk about whether or what or how or the authority. He instructed me to draft a strong application and return it to him. I did do that. I did not talk about what was in the application, though the application itself I believe suggested a briefing schedule to determine whether or not there should, in fact—the application said, " * * * prays that the honorable court will enter its order vacating the part of the order entered January 7 and overruling the motion to transfer the case of Freidco and to set the matter for further briefing and argument."

I did not ask him to transfer it back. I did not ask him to consolidate. I asked him to reconsider, which is what he told me to do. I asked for briefing on the issue. At no point did the judge attempt to consolidate. The judge simply wanted to have a dialog on what was in the best interest of the Unit, Inc. chapter 11 that he was administering.

The judge testified he called the bankruptcy judge in Wilmington, Del. and told her he was going to do that. The judge, after looking at the draft order that Michael had prepared, dismissed us. I had no idea what he was going to do with that application, whether he was going to issue an order, whether he was going to file it, or whether he was going to do anything.

The next thing I knew was we did get an order from the judge and I did convey that to Wilmington counsel. Now, the strongest piece of paper that would indicate Judge Gartner's approach and belief that what he was doing was right and within his administrative powers is the sua sponte order that is attached to my comments he issued on July 26 in which, again, he orders people to come to talk to him about what is happening in Wilmington, why the 71 percent of the building that he believes is before him in his property should not be controlled by him, his doubts about the appropriateness of a trustee. This is an order that in no way involves me or anybody from my office.

It indicates Judge Gartner's thinking.

Now, when a lawyer is invited to a judge's chambers, the judge sets the tone of what is conducted in that chamber. The judge has the authority to have ex parte hearings on anything that he deems is legal and appropriate for the administration of justice. The cannons provide that. Anything that is authorized by law. The disciplinary rules have an exception in them that if a judge does do that, you are allowed to participate in anything authorized by law.

Now, if we had gotten into the substance of the application to reconsider, I think I would have stopped him, but it is really hard to sit there and talk about administration and procedure and say, "Judge, I just think you went too far."

We did not talk about anything in that application, and I said before and I will say again, having appeared before the third circuit, having spent the last year with the ABA and the last month before this committee, had I to do it over, I would back off sooner. But I did not back off sooner. And the judge took it from there and went forward.

I think I have laid out, in my comments, and I will not bother to read it to you, the fact that I, at no time, felt or believed, nor am I certain that I am out of a gray area, that I did anything wrong by submitting that application to him as long as it was procedural.

I think that the application itself gets close to being substantive and it certainly would have been if we had talked about the content. The application was to reconsider and have a briefing schedule on what he should do. I did not ask him to consolidate. There is a difference, and it is a significant difference.

Now, I get down to, I guess, what I consider to be my bottom line on this point, and that is, I did what I thought was appropriate under the circumstances. I did not bring in the order. I did not initiate the contact. I did suggest the only procedural way I knew that anything could be done, and the judge told me to draft it. I presumed if he did not like what I drafted, he would not have done anything. I presumed that what I drafted gave him some basis for the order that he ultimately issued.

But I had no intent of going over there, sneaking in, trying to persuade anyone to do anything, and I guess to me, it is as clear as the nose on my face, that I did not take the Freidco order over there in the first place. I did not ask for any help. I did not want to be there.

I have said that before. I had two cases I was winning with Judge Gartner, and one case I was losing in Wilmington. It is nice of Drew Moore and Senator Metzenbaum to say what persuasive powers I had over Judge Gartner. The fact is I do not think I won that many. I lost a lot, too.

Now, ultimately it is up to this committee to determine whether that contact, in anyway, bars my confirmation to sit as a circuit judge, and I can say in all honesty and candor I meant no wrong. It was not my intention. I did not create the meeting. I did not bring in the order. I did not talk about Freidco. I was happy where I was, and I would rather not have been there.

On the other hand, I was responsive to what Judge Gartner considered to be an administrative conference and we went and talked both about administration and procedure. It was not and is not a habit of mine to go running to judges.

We have heard a lot of accusation about it, but most of them come from nameless faceless people. We get down to a couple of exparte accusations. I think I have disproven some this afternoon that were made.

I did not deliberately set out to do anything wrong in the Unit, Inc. Freidco relationship, and had I meant that I probably would have taken the order over myself. Had I meant that I would not have been called over to explain the order. The conference veered closer to the line that I think appropriate today, but I do not think that should bar me from being a Federal judge, and I do think that I have learned from it.

I would like to pass on, if I may, to question 20 of the American Bar questionnaire which is the same questionnaire that comes from the Department of Justice, and point out that it talks about a lien or collection procedure. I repeat, again, as I repeated to Senator Metzenbaum a week or so ago, there are specific Internal Revenue Code provisions that provide for liens and collection procedures, and they are not included until after you have gone through the Audit Division and then the Appellate Division, and there has been an assessment of taxes and a notice and a demand to pay.

And I point out to you that is clear. It is stated by law, and that in making that charge, the ABA with its vast legal resources should have been aware that these allegations, at best, lacked the merit required by the ethical considerations that it sets.

I did not lie on that question. I answered it responsively. There was no lien. There was no collection procedure as established by law.

Now, we come to a point when we were talking about my taxes where it becomes very interesting whose memory serves whom, which way. When I was asked about my 1968 taxes by Mr. Coleman, the question, as I remember it, and the question that I got from the U.S. Department of Justice was, he was concerned about an IRS investigation to audit you when you were nominated to be a member of the Federal Communications Commission which allegedly caused you to withdraw your name, the IRS investigation that caused me to withdraw my name.

And I responded. It is all set out in here. I will not bore you with it. I believe the auditor's principal claim which was disputed was that I received $166,000 of constructive income.

The other $40,000 that has been so prominently displayed at this hearing had been paid prior to the FCC nomination. It was not the reason that I withdrew from the FCC nomination, and the question was framed in what caused me to request that my FCC nomination be withdrawn.

We had one issue in contest, and that was the constructive income issue. I also believe that the letter that Senator Hatch referred to earlier today that just came over from the IRS would indicate that I paid that amended return prior to the Intelligence Division being called in. I think it will show that I paid my amended return on May 20, and the Intelligence Division was called in on July 24. I believe that letter will go in the record.

There is no way for me to explain how I forgot that payment. I made an error in saying it was a legal fee. The Internal Revenue Service called it a finder's fee. My lawyers and I concluded that it was a sale of rights. The tax effects were all the same.

I was offered a theory, at least, in which I could have said it was a nontaxable event by what I considered to be eminent tax counsel here. I concluded that I should pay it. It was a taxable event, and I did pay it.

I do not think that it is really of great import whether I revealed it first to the Internal Revenue Service or they had an audit underway first. I heard a date today that surprised me that they had some sort of audit going in early 1969. If they did, I was not notified of it, and therefore, it should not have great import.

The point is that I did pay it. I filed it. I did notify Mr. Eggers. I maybe did not do it with the formality sufficient to satisfy everyone in this room, but I did notify Mr. Eggers. He has the same duty I have as a Federal officer, whether it is a casual conversation, whether it is over cocktails or whether it is in a formal standup meeting in his office. If he is advised of an underpayment, he has a duty to report it, and he did report it.

I considered that conversation just as important as if we had an appointment in your office, Mr. Chairman. I revealed it. I intended to pay it. I did pay it.

Now, we have had extended conversation about the length of the investigation, who investigated me, whether it was a criminal investigation, a civil investigation, all of the investigations. But at the end, in 1971, the Internal Revenue Service, representing this

Government and myself with my counsel, concluded that it was a negligent oversight and I paid a negligent penalty. If there had been more to it, I think that they would have pursued a civil penalty or a criminal penalty or done other things.

I did not mean to mislead the ABA about why I withdrew from the FCC. I did not mean to hide $40,000. I think Mr. Coleman overstates when he said I had a great income during that year. I do not remember it being a great income. It was an unusual transaction. Until that time, I had only dealt in income from my law firm and some capital transactions and savings accounts.

I had no intention of ever trying to hide $40,000 of income, and it would have been an impossibility. It would have been a destruction of a career that I hope you will give me the intelligence or at least credit me with the intelligence not to try to have done anything like that.

I have responded to the satisfaction of the IRS 14 years ago.

Now, again, at pages 22 and 27 of Mr. Coleman's statement today, he attempts to impute to himself the knowledge of the Department of Justice concerning my tax matters, and again, I suggest he has not been certain of the merits of his complaint.

The Department of Justice got the same questionnaire that the ABA got and the Department of Justice knew about the amended return and the Department of Justice did not consider it to be an inappropriate response.

It seems to me that before that claim is made before this committee there should have been some verification between the ABA and the Department of Justice on whether they were aware of the amended return and whether it was of concern to them. That was not done.

Now, when we talk about Ethical Consideration 8-6 and motivation, I would like to point out to you that when I met with Mr. Coleman and Mrs. Born, I asked them about motivation of some of these people, and they told me it was not any of my business, that it was my job to respond to their questions.

For a moment, I would like to point out to you that I think the animous of Paul Welsh has been previously set out in my statement where he accused me of suborning a judge and other things. Robert Keeler, to whom Mr. Coleman refers as a distinguished Cincinnati lawyer who has written this committee, still was found to be contemptuous in his conduct in a rather lengthy trial, the same trial that he accuses me of ex parteing the judge. Mr. Keeler has written, at the request of the ABA, to the chairman of this committee; at the request of Mrs. Brooksley Born, the counsel to the President of the United States, at the request of Lewis Van Dusen of this committee, Senator Metzenbaum; and that Mr. Keeler launches into the utmost pure fiction without a scintilla of evidence to damage my reputation when he says, and I quote from these letters, "Unger barricaded the door to his office and it was some time before the door could be forced open," when referring to my departure from American Financial Corporation.

Mr. Keeler has no evidence of that. It was adopted by the ABA, and it is damaging. It is adopted as exhibit 5 in the ABA initial submission.

I point out that the ABA was advised of Mr. Rosenberg's vindictiveness when Mr. Rosenberg wrote them saying he was sending the same things to Mr. Coleman that he sent to a U.S. attorney when he tried to block my confirmation or appointment, if you will, as General Counsel of the Department of Commerce.

Now, I would like to make a couple comments, if I may, and I know time is getting short, but what I went through with the ABA was not exactly what I would call a friendly gathering.

Mr. Coleman, when I first met him, asked me was it not true, did I not sit around and drink with Judge Gartner every night after work. Mr. Coleman asked me was it not true that I was too friendly with an Intourist guide in Russia in the midsixties.

Mrs. Born asked me were I not part of the Nixon Administration. I felt I was being cross-examined and treated like a second rate defendant and not a prospective nominee to the judiciary.

And I was constantly forced to find papers and respond to anonymous charges that they dropped when I was able to find something. I was told, even though I was sent by the Department of Justice, that it was Mr. Coleman who was there to protect the President of the United States from me.

I tried hard for the last year and a half to find every piece of paper I could to recreate my life and try to remember it and to be responsive. I am a good trial lawyer. I am an honest man. I raise some questions as to the standing of the ABA. I really have some doubt whether it is, in fact, an advisory committee or a de facto advisory committee from which I am denied my rights as the person being investigated because they do not comply with the advisory committee law, I would suggest that it goes just beyond my simple confirmation here today that the ABA has, in fact, wedged itself between the nominating process of the President of the United States and the confirmation process of the Senate of the United States.

If the ABA does not approve, the Senate does not see it. It is very seldom that the White House will take on the ABA, and when they do, this is an example of the kind of contest that results.

I find that I consider my treatment something less than evenhanded, something less than reasonable, something less than open, something less than fair.

I know we are running out of time, and I simply want to refer, if I may, to Justice Moore's comments. Senator Specter asked for the transcript. We were able to find the notes and have them transcribed. I think the transcript speaks for itself.

Mr. Kohn did attempt to correct my affidavit. My affidavit was in error. Justice Moore, in a response that I saw this afternoon points out the fact that we had gotten a number of letters from Mr. Tybout, and in the letterhead, Mr. Elzufon's name was there. He is absolutely correct, and, gentlemen, those of you that practice law, I might ask you how many of you read the letterheads of incoming correspondence to see whose name is on the letterhead when you read the correspondence. I do not. We missed it.

I was, at no time, trying to duck my responsibility. I know Senator Specter asked me specifically about going forward with the motion. I attached to a letter to Senator Thurmond, a copy of which went to Senator Specter, where Mr. Kohn contemporaneously raised the issue of waiver, and I attached also a small and a newer memorandum on the issue of waiver and whether counsel has a right to waive that for his client.

I think he could have fired me and hired a new lawyer and raised the same issue.

I simply say the book that I have handed in, together with documentary evidence, meets most of the issues that I think are of import and not technical. I say I have not been a perfect lawyer. I have tried. I have made mistakes. I am an honest man. I am a good advocate. I would be a good judge. I want to be a judge. And if you do confirm me, I will not disappoint you.

Thank you.

Senator HATCH. Thank you so much, Mr. Unger. We will pay attention to your statement.

Senator Specter?

Senator SPECTER. I think the issues are before us, Mr. Chairman. I appreciate your explanations and your comments, Mr. Unger. I do want to say, at least for myself, that I am prepared to sit for whatever additional length of time you wish to testify. I do not want you to feel at all hurried because the other side has had a disproportionate amount of the time.

Mr. UNGER. I am willing to sit here and answer questions as long as you would like to ask them.

Senator SPECTOR. Well, I think the issues are really very much before us, at least I feel that way. I have gone over your comments and the other evidence and I have no additional questions at this time.

Thank you, Mr. Chairman.

Senator HATCH. Thank you, Senator Specter.

As I have reviewed the supplemental statement of Mr. Coleman on behalf of the ABA, you have answered this in what you have given to us. You have covered the ex parte situation, and what you are saying is that the judge called you in. You discussed what you thought was a procedural discussion although the judge requested you to present the order and the memorandum that you did——

Mr. UNGER. The application and the memorandum that were required.

Senator HATCH [continuing]. The application and the memorandum.

In the memorandum you made it clear that you were not seeking final relief on the matter.

Mr. UNGER. That is correct, sir.

Senator HATCH. And that although you felt that in retrospect you wished that had not occurred and you felt uncomfortable with it at the time, you still responded to this judge.

Mr. UNGER. I did. I would not let that happen again on either side of the bench.

Senator HATCH. With regard to the tax matter, if I understand you correctly you are saying that this was a one-time-only matter, that you had overlooked it. How much had you earned that year?

Mr. UNGER. With the $40,000 minus the deductions, about $101,000. I have no memory of holding myself out as being a big earner in that year. There have been some subsequent years where I have paid taxes higher than my gross income in that year.

Senator HATCH. So without it you made somewhere around $60,000 or $61,000?

Mr. UNGER. Yes, sir; and it was an unusual transaction, the first of that kind in my life.

Senator HATCH. That is not the $46,000 that somebody mentioned earlier in the hearing?

Mr. UNGER. I think Senator Metzenbaum took the lowest figure. It was a distribution from my law firm which was $46,000 or $49,000 plus other capital gains and payments that I believe got it to $68,000 or $69,000.

Senator HATCH. You mentioned before that this was totally resolved between you and the IRS.

Mr. UNGER. Yes, sir; the IRS determined I was negligent and I had to agree with them.

Senator HATCH. One of the problems that arose is that in your response to this committee you did not indicate that you were ever investigated from the criminal standpoint, but you knew at the time that this was an intelligence division investigation.

Is there any reason why you made the response you did?

Mr. UNGER. Yes, sir; the ABA asked substantially the same question, and I said there were no criminal investigations that I knew of. After I got into the ABA investigation, I found out that Mr. Rosenberg had turned me into the U.S. attorney and that I had been part of the investigation that I thought was my clearance process but it was also a criminal investigation.

I notified this committee of that. I had no recollection when the intelligence division came in of getting a Miranda warning or understanding that that was a criminal investigation.

I have since been advised that it is. When I filled out this form, I did not have that recollection. There was nothing to hide. My tax records are open. There would be no reason, again——

Senator HATCH. Are you saying that you felt you had resolved all this so there really was not an investigation?

Mr. UNGER. Yes, sir; I thought it was resolved, but I did not think it was a criminal investigation. I had no recollection of it being criminal.

Senator HATCH. All right. You are not a tax lawyer, then?

Mr. UNGER. No; I would not call myself a tax lawyer. I use Arthur Anderson an awful lot. I have tried some tax cases but not fraud cases.

Senator HATCH. OK. Now, with regard to the false affidavits, I think you have basically covered that.

Mr. UNGER. I think I have.

Senator HATCH. With regard to the HUD termination which was raised by Mr. Coleman, you indicated that you did have political differences with Mr. Romney and others who were there including Oakley Hunter.

Mr. UNGER. Oakley and I, actually, in many respects were friends. I helped him get his job. There was some political differences between Mr. Van Dusen, Mr. Romney, and the White House. I was seen as the White House's man. There were differences. We did not get along well.

Senator HATCH. And you are saying the fact that you were subsequently nominated to the FCC indicates that you were not fired at the time.

Mr. UNGER. No; I did not consider myself to be fired. Other people thought they fired me, perhaps. If I were fired by the President, I doubt if he would have left my FCC nomination pending. I doubt if he would have appointed me to another commission.

As Senator Scott said, he pushed to have me relieved so that his constituent could get that job and I was relieved of responsibility. I did not consider that to be a firing. We are now talking about nomenclature, and I think it comes from what perspective you are looking at it.

Senator HATCH. Well, if I understand the fifth point that Mr. Coleman has made here in his supplemental statement, it was concerning the bankruptcy fees—that you received $12,000 in advance of the court approval of that amount of money.

Mr. UNGER. He is absolutely correct. I once responded to the Justice Department that I did not know that. I did not remember it. I received $12,000 without prior approval. There was subsequent approval. That was out of $997,000. It was not intentional.

Senator HATCH. In other words, you had a $997,000 fee.

Mr. UNGER. Yes, sir, $12,000 out of that. The first $12,000 when I was first finding my way through the bankruptcy court was approved only through the debtor's monthly report.

Senator HATCH. As I recall, you claim that you immediately informed the court after the error was pointed out?

Mr. UNGER. The court got a monthly report from the debtor in possession that showed that I was paid some roughly $2,000 a month for some 6 months. We also advised the creditor. Nobody ever raised that during the whole trial. At any time that issue could have been raised. At any time I could have had to repay the money. I simply did not know that I should not do it.

Senator HATCH. Was any harm done here?

Mr. UNGER. No, sir.

Senator HATCH. Did you confess error in the matter?

Mr. UNGER. Yes; as I say, he is technically correct. He is absolutely technically correct.

Senator HATCH. Other than those five matters, the ABA does make certain other allegations in its conclusion. As I recall, you answered those. However, I have not read that far in your statement. Have you answered those additional allegations?

Mr. UNGER. What I would call the laundry list of today's submission?

Senator HATCH. The sixth section, "Summary of Misrepresentations to and Failures to be Forecoming" with the ABA Committee and the Department of Justice, do you feel you have answered that in writing?

Mr. UNGER. No; I have not answered all of those in writing. I did not have time, but I will be glad to do it right now.

Senator HATCH. Maybe we better do it then. Let me ask you this. What the ABA seems to have done here in listing their allegations is to first list the allegedly wrongful conduct by you and then list additional instances of wrongful conduct such as your alleged failure to list such conduct on your questionnaire.

Now, that certainly does build the list of allegations quickly if you do it that particular way. Do you have a copy of this supplemental?

Mr. UNGER. Yes; I do. I have it in front of me, Mr. Chairman.

Senator HATCH. Would you take each one and give us your response to it? I figure we have about 10 minutes before there is a bell.

Mr. UNGER. On question No. 1, which is "Was I ever under State or Federal investigation?" at the time I answered that I thought I answered it honestly.

Senator HATCH. You have answered that one. No. 2.

Mr. UNGER. I have answered No. 2 in writing. They are wrong. My answer is correct.

Senator HATCH. In writing, the one you have submitted for the committee.

Mr. UNGER. Yes; it is in writing.

Senator HATCH. And No. 3.

Mr. UNGER. In No. 3, they ask a question about any litigation that I was involved in and named in the litigation that I was involved in. Then they add that I failed to tell them that in the Freidco matter where these injunctions were issued, I was named as counsel for Unit, Inc. That was in my representative capacity. First, I did not think about it. Second, I do not consider myself to have been named the way I believe they mean when they say, "were you ever a party to litigation." I was named only as counsel to Unit, not as a named defendant and as an individual. But they make much of it.

Senator HATCH. No. 4.

Mr. UNGER. I have never been disciplined. They seem to want to make something of the comment from the third circuit, but I read that question meaning a formal complaint to any court or administrative agency, not a passing comment from a judge in oral argument based on a brief that I thought was something less than fair coming from the other side.

Senator HATCH. To your knowledge, have you had any ethics complaints filed against you in your 30 years of practice?

Mr. UNGER. I have not. I have no knowledge of any.

Senator HATCH. No. 5.

Mr. UNGER. Wait. I understand by hearsay—I do not know if there is a complaint filed. I understand, because Mr. Short says, that the D.C. bar read of our hearing, and they are doing something.

Senator HATCH. They have requested the materials.

Mr. UNGER. But I have no knowledge of an ethical complaint having been filed with them.

Senator HATCH. Ok. No. 5. This is the allegation that you made no mention of the findings of fact adopted by bankruptcy Judge Balick in the same matter.

Mr. UNGER. I think that probably slips under the catch-all question 29, did I think that is something I should tell them. I do not know where else that appropriately belongs.

Senator HATCH. Do you feel you have answered that?

Mr. UNGER. I did not think that kind of order was something that I thought was either adverse or positive or negative. It came from hard-fought litigation and Mr. Welsh wrote well.

Senator HATCH. I will be happy to keep this record open for you to answer each of these in writing if you feel you have not had sufficient time here today. I do want to end this today, if I can——

Mr. UNGER. I appreciate that.

Senator HATCH [continuing]. Because we have had enough time, and I admit that I necessarily have hurried you. I sent a note to you figuring that we should try to finish by 6:00, knowing that there was a vote coming up. But I will keep the record open so you can respond in writing as well. Is that fair enough?

Mr. UNGER. Thank you very much.

Senator HATCH. I think we could go through the rest of these questions. You have answered some of them, others you have not.

Mr. UNGER. Some of them are repetitive, I might suggest.

Senator HATCH. That is right. So I would like you to answer each of these 16 additional points in writing if you could, and I would like that by Monday.

Mr. UNGER. I will have that done.

Senator HATCH. Should Mr. Hahalyak or Mr. Berger want to respond in writing, I would like to have your responses by Monday as well if you can. Or the ABA.

Mr. HAHALYAK. Mr. Chairman, is it possible to have only 3 minutes just to make a statement?

Senator HATCH. We have to vote, Mr. Hahalyak. I think we are giving you an extreme amount of courtesy here leaving the record open. We are going to give you that opportunity, and we are going to pay attention to what you write. Frankly, I think it will be more influential and more persuasive if you do put it in writing.

I understand that the ABA raised another allegation against you yesterday. Could you tell us the thrust of that one?

Mr. UNGER. I think I got it this morning that I talked to somebody in a case in 1959, I guess, when I was 31 years old. I have very little recollection about it. As I remember, I was an associate of Frost and Jacobs. A client of our got a lemon at a Lincoln-Mercury dealer. I was told to resolve it. The client wrote to the Lincoln-Mercury people himself, not to the automobile dealer. They wrote back saying you ought to be able to resolve this. I think I called the dealer and said why don't you and I and your lawyer get together and see if we cannot settle this. The lawyer said I should not have called his client first. And that is about as much as I can recreate from over a quarter of a century ago, and I might add the man who makes that complaint works for Mr. Keeler.

Senator HATCH. Let me ask you this. I believe you have testified that you have practiced law for 30 years. Most of the allegations involved in the ABA's indictment of your nomination seem, however, to spring from a very small number of cases.

Putting aside the specific allegations, what is the total number of cases to which the ABA is referring in its memorandum before the committee?

Mr. UNGER. Four maybe, and of those four, I question motivation in most of them.

Senator HATCH. Let me just state for the record that Senator Dole has some questions that will be submitted to you. If we could have your responses to those by Monday as well, I would like to button this all up by Monday.

Mr. UNGER. You will have them, sir.

Senator HATCH. I think that is fair. Everyone here has had their say, and everyone involved, it seems to me, has had an opportunity to respond.

We will keep the record open for all parties including the ABA until Monday. I know this has been a very difficult set of hearings and proceedings for you and frankly I apologize to you that you had to sit here a number of days before you could be asked questions about your position. I additionally apologize to you that due to the pressures of time, we have cut you a little bit short here today.

You have gone to an extreme amount of work in the submission of your rebuttal to what the ABA and others have said, and I commend to all Senators to read that. We have the obligation to look at it and compare that to what the ABA and other leave said and make a final decision on this matter.

I would just like to thank all witnesses in this confirmation proceeding. I think we have had an interesting set of hearings. and I appreciate the efforts that have been put forth. I appreciate your efforts, sir, and I certainly appreciate the great amount of work that is voluntarily done by the American Bar Association in this matter by all three of the people who sat at the table today, particulary Mr. Coleman and Ms. Born.

With that we will recess these hearings and hopefully complete them by Monday in writing.

[Whereupon, at 5:56 p.m., the proceedings adjourned at the call of the chair.]

APPENDIX

GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

September 30, 1983

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Attention: Robert J. Short

Dear Mr. Chairman:

Since the hearing this morning, I have attempted to get copies of my 1968 tax return from Arthur Andersen & Company, both in Cincinnati, Ohio and Washington, D.C. (both of whom had copies of the amended return). Each office reported that they had checked their files but that they have a record destruction program eight years after the return year. I have located no personal copy; however, I have located a settlement file which provides a great deal of the information which Senator Specter requested. Tab A reflects the Preliminary Statement of the Alleged Deficiency by the auditor -- that is Form 1907. That form indicates I filed an amended return for the year in question, 1968, on May 20, 1970 and paid an additional tax of $16,988.99.

Enclosed as Tab B is the protest filed on my behalf by Cincinnati counsel which emphasizes the constructive income claim, though the bottom of page 4 shows the $40,000.00 figure mentioned by Senator Metzenbaum was not for services rendered but a sale of rights. The protest indicates that at least $30,000.00 of that went immediately back into the newly formed company and not through my personal or business checking accounts. I will continue to try to reconstruct that transaction.

Enclosed as Tab C is Form 3611, which is a settlement calculation which, if I am reading it properly, indicates that the IRS did drop their constructive income theory and converted to a capital gains theory which occasioned $5,625.00 of taxable income which was agreed upon and paid in late 1971 by a tax of $3,023.42 and a penalty of $151.17.

In addition, for your confidential information, I enclose a summary of my taxable income and taxable liability recently prepared by Arthur Andersen for the years of 1977-1982 that shows for the last six years I have paid federal taxes in excess of 50 percent of my total taxable income. While I recognize it is not totally in point when reviewing the precise 1968 issue, I believe it is a reasonable indication of my approach to my duty to pay taxes.

In addition, Senator Specter requested I make available a copy of the Carl Ruediger letter referred to in the July 10, 1970 Office of Legal Counsel opinion of Mr. Rehnquist. Enclosed is a copy of that letter dated June 19, 1970 secured from the Office of Personnel Management this afternoon. We were advised that incoming letters are destroyed after two years and that my letter of June 9, 1970 has been destroyed.

I sincerely hope that these documents are of assistance in resolving any concerns.

Very sincerely,

Sherman E. Unger
Sherman E. Unger

Enclosures

FORM 1907
(REV. JULY 1967)

PRELIMINARY STATEMENT

10-20-70 R

NAME OF TAXPAYER(S)
Sherman E. and Polly V. Unger
7935 Indian Hill Road
Cincinnati, Ohio, 45243

SHOW SOCIAL SECURITY OR EMPLOYER IDENTIFICATION NUMBER (Husband's number if joint return) 266 20 7911

SUMMARY OF PROPOSED ADJUSTMENTS

TAXABLE YEAR	INCOME TAX DEFICIENCY	INCOME TAX Agreed ~~OVERASSESSMENT~~ Portion	OTHER TAX (Specify) DEFICIENCY OR OVERASSESSMENT	Negligence PENALTIES-INCREASE ~~OR (DECREASE)~~ 301.6653-1(a)	Negligence on PARTNERSHIP, FIDUCIARY OR SMALL BUS. CORP. INCOME INCREASE OR (DECREASE) on agreed port.
1967	$ 2,776.31	$ 2,776.31	$	$	$
1968	98,231.27	20,748.01		4,911.56	1,037.40
1969	315.76	315.76			
TOTALS	$ 101,323.34	$ 23,640.08	$	$ 4,911.56	$ 1,037.40

NET DEFICIENCY OR ~~(OVERASSESSMENT)~~	NAME OF EXAMINER	NAME OF TAXPAYER'S REPRESENTATIVES	AGREEMENT SECURED
$ 106,234.90	Frances H. Jeffre	Leonard L. Silverstein, Wash.D.C. Wm.R.Seaman & J.L.Cowan, Attys.	☐ YES ☐ NO Partial

PRINCIPAL CAUSES OF CHANGES, AND OTHER INFORMATION

The principal causes of the changes proposed in this report, are additions to 1968 income for services performed for co-investors in Modern Media, Inc.; and lack of substantiation of dependency claim for grandmother, and of some miscellaneous expenses claimed under Itemized deductions.

A portion of this report is agreed and has been so identified. You have signed Form 870 for the agreed portion and have agreed to assertion of the negligence penalty under Reg. 301.6653-1(a) on the agreed deficiency for 1968. The negligence penalty was recommended because you did not use reasonable care in preparing your 1968 income tax return.

You filed an amended return for 1968 on May 20, 1970, and paid additional tax of $16,968.99. As of this date, this additional tax has not been assessed, but stands in your account with us, as a credit.

SCHEDULES AND/OR EXHIBITS ATTACHED

B

RECEIVED
31 JAN 1971
DIRECTOR INT REV
CINCINNATI
TELLER - 621

District Director of Internal Revenue
P. O. Box 476
Cincinnati, Ohio 45201

Re: Sherman and Polly Unger - 1968

Dear Sir:

Receipt is hereby acknowledged of your letter dated November 4, 1970 enclosing the report of Examining Officer Frances M. Jeffre dated October 20, 1970 and proposing deficiencies in the Federal income tax liability of the above named taxpayers for the calendar and taxable years 1967, 1968 and 1969 in the amounts of $2,776.31, $98,231.27, and $315.76, respectively, and asserting the 5% negligence penalty provided for under section 6653 of the Internal Revenue Code.

Pursuant to permission granted in your letter, protest is hereby made against the proposed deficiency and penalty and the Examining Officer's findings. In support hereof the following facts are submitted.

a) Name and Address of Taxpayers.

Sherman E. and Polly V. Unger
7935 Indian Hill Road
Cincinnati, Ohio 45243

b) Date and Symbols of Your Letter.

November 4, 1970 - RL 4-42 Code 430

c) Years Involved and Disputed.

1968 $81,357.42

d) Findings to which the Taxpayers Take Exception.

1. The finding of the Examining Officer that the taxpayers, Sherman Unger and Polly Unger, realized additional income in the year 1968 over and above that reported on their original and amended returns for that year in the amount of $136,666.67, purportedly for services rendered by Mr. Unger to co-investors in Modern Media, Inc. and its subsidiary, Modern Talking Picture Service, Inc.

e) Facts upon which the Taxpayers Rely.

The Examining Officer in her lengthy and quite detailed explanation of the basis for her determination, which contains certain misstatement of the facts; partial statement of other facts; and omits entirely other facts of which she was fully aware, has attempted to create an implication or an inference of the existence of additional facts essential to support her conclusion, in itself based on an inference, that Sherman Unger received a "constructive" payment (no actual payment was ever made or received) of additional compensation for "services to co-investors" in the amount of $136,666.67.

Although the lengthy and involved recitation of "facts" commencing on p. 6 and running through p. 9 of the Examining Officer's report purports to support her position with reference to the additional income item (d) on Schedule 3d of $37,306.14 (which amount is her computation of the tax on the income reported and taxed by taxpayer's amended return), certain of the alleged facts set forth therein are later urged by the Examining Officer as providing support for her determination that Mr. Unger received additional compensation in the amount of $136,666.67 from Messrs. Resor and/or Taylor and/or Ohio Venture Capital Corporation and/or Midwest Venture Capital Corporation. Without elaborating on such factual errors herein (taxpayers' representatives believe that such errors can be more properly considered in the context of a District Conference) some passing reference to some of these errors is appropriate here.

First, by quoting only limited parts of the tender offer letter, the Examining Officer attempts to infer that at the time of the issuance of the tender offer Mr. Unger already had a binding commitment from Messrs. Resor and Taylor or the venture capital corporations to honor the terms of the tender offer if it was accepted by the stockholders of Modern Talking Picture Service, Inc. (MTPS). This was not the case. Both Messrs. Resor and Taylor had expressed considerable interest in the purchase, but at the time of the issuance of the tender offer, May 10, 1968, they were not legally committed to either purchase the stock of MTPS or to share in any potential liability which might have ensued had Mr. Unger defaulted in the performance of the terms and conditions of the tender offer.

Second, the Examining Officer refers to the resolution of the Board of Directors of MTPS authorizing the sale of the assets and liabilities of the company to Sonderling Broadcasting Co., wherein a fee of $300,000 was to be paid to Commonwealth Corporation Dev. Co. of Philadelphia for its services on the sale and $100,000 was to be paid to a Mr. Sidney Pepper; and that after Mr. Unger's offer of May 10, 1968, the Board of MTPS rescinded the earlier resolution. The implication is that the resolution was rescinded solely by reason of Mr. Unger's offer, whereas the facts are that the resolution authorizing the sale to Sonderling was based upon certain misrepresentations by Mr. Pepper as to the extent of his personal and financial involvement with the parties involved, and the rescission of the resolution resulted from the discovery of those misrepresentations, and the determination of the Board and the stockholders of MTPS that the fees called for under the resolution were totally unreasonable. Subsequently, in her report the Examining Officer uses this resolution as "evidence" of the value of the alleged services in an "arm's length" transaction. This is patently ridiculous for a host of reasons, not the least of which are that the transaction was never consummated, and as litigation involving MTPS and its shareholders against Mr. Pepper disclosed, it most certainly was not evidence of the reasonable value of such services.

Third, the Examining Officer states that on June 11, 1968 Mr. Unger "billed his clients, Mr. J. T. Resor and the Midwest and Ohio Venture Capital Corporations for a total of $40,000 for the right to acquire 2/3 of the capital stock of MTPS, Inc. ..." This statement is not accurate. Mr. Unger did deliver to Mr. Resor and the venture capital corporations receipts acknowledging the transfer of two-thirds of his rights to acquire the stock of MTPS in consideration of the payment of $40,000.

Fourth, there are other discrepancies in the Examining Officer's account of the formation and capitalization of Modern Media, Inc. (Media). Although correctly stating that Messrs. Unger, Resor and the venture capital corporations each acquired one-third of the stock of Media for $30,000 plus one-third of the right to acquire the stock of MTPS, and noting the fact that interest bearing demand notes were issued by Media to Mr. Resor and the venture capital corporations for $400,000, the Examining Officer conveniently ignores the sworn statements, copies of which were delivered to her, of both Mr. Resor and Mr. Taylor that at the time these notes were issued by Media, June 13, 1968, they both considered such notes to be a valid and binding obligation of Media, and fully expected to be repaid for such loans. As of June, 1968, their cost for their Media stock was exactly the same as Mr. Unger's: $30,000, not $250,000 as the Examining Officer states.

Fifth, throughout her report, the Examining Officer by reference to "the $2,551,500 corporation" and the "minimal" investment of the shareholders in Media, attempts to convey the idea that the purchase of MTPS was a "bargain" purchase for all of the shareholders of Media, and especially Mr. Unger, and that the shareholders have made enormous profits on the transaction. That there was a very great risk involved in the purchase, which justifies the use of substantial amounts of debt to finance the purchase, can easily be seen by evaluating the purchase with the benefit of a little of the hindsight which the Examining Officer so frequently utilizes to support her conclusions. Following an unsuccessful effort to effect a public offering of the stock of MTPS in the spring and summer of 1969, MTPS was merged in KDI Corporation in December of 1969. Each of the three principal shareholders of MTPS (Messrs. Resor, Unger and the two venture capital corporations) received approximately 50,000 shares of the common stock of KDI Corporation. Because of S.E.C. rules relating to "pooling of interests", however, the MTPS shareholders had only limited rights to dispose of the stock acquired in the merger. As of January 4, 1971, with the principal MTPS shareholders still holding, directly or indirectly, nearly all of the stock acquired in the merger, the value of their total investment was approximately $187,500, for which they paid $490,000, and KDI Corporation had filed a petition for reorganization under Chapter XI of the Bankruptcy Act.

There are other errors of a factual nature in the Examining Officer's recitation. However, most of this recitation would appear to have very little, if any, relevancy to the major item of the proposed deficiency and, accordingly, no useful purpose would be served in discussing them in this Protest.

With reference to the Examining Officer's Explanation of the principal item of adjustment, commencing on page 14 of her report, there are also both errors of commission and omission.

The real difficulty the taxpayers and their representatives have with the Examining Officer's recitation which purports to support her conclusion that Mr. Unger had additional income in the amount of $136,666.67 in 1968 is that it ignores or omits pertinent facts, of which the Examining Officer was aware, but which are totally inconsistent with her premise, and it either ignores or disregards events which took place and their effect on the chronology of the transactions involved to the point where the effect overall of the statement is substantial distortion of what transpired.

At the outset, for example, the Examining Officer states: "There was a disproportionate distribution of Modern Media stock." This statement is totally inaccurate. There was only one distribution of Media's stock which took place on or about June 13, 1968, pursuant to the performance of subscription agreements executed June 7, 1968 wherein Messrs. Unger and Resor each received 200 common shares of Media and the two venture capital corporations each received 100 common shares of Media for a consideration of $150 per share plus 1/600 of the rights to acquire MTPS. The Examining Officer attempts to bootstrap herself into the application of a disproportionate distribution of stock under section 351 of the Code, by a "thin" capitalization argument which she contends justifies her conclusion that Mr. Resor and the venture capital corporations paid $460,000 for the 400 shares of common stock of Media issued to them on or about June 13, 1968. From this "conclusion", the Examining Officer then infers that since Mr. Resor and the venture capital corporations "paid" $460,000 for two-thirds of the stock of Media and Mr. Unger only paid $30,000 for one-third of the stock of Media, they (Resor and the venture capital corporations) were paying off their "obligation" to Mr. Unger.

These "conclusions" simply will not stand the light of analysis. As to the "thin" capitalization argument, the Examining Officer completely misconstrues the effect of a determination that a corporation is too thinly capitalized. In tax cases, a finding by a court that a security which purports to be a debt instrument is to be treated for tax purposes as though it were an "equity" investment in the corporation, has either or both of the following tax effects: (1) a disallowance, as a corporate deduction, of the "interest" paid or accrued on the security; or (2) the classification of repayments of "principal" of the debt as taxable dividends rather than a tax-free return of capital.

But neither the question of the deductibility of the interest payments to Media nor the classification of any repayment of principal are at issue in this proceeding. None of the "thin" capitalization cases even purport to consider the matter critical to the Examining Officer's conclusion, let alone give support for her position. Even assuming for purposes of illustration that the loans of Mr. Resor and the venture capital corporations constituted an "equity" investment in the company, and the taxpayers do not intend to concede or even imply that this was the case, there still remains open the questions of the nature of that equity and its characteristics for both tax and non-tax purposes. The Examining Officer blithely assumes that the loans were an equity investment, and that they were simply additional payments for the common stock issued at the inception of the corporation. The taxpayers believe that this assumption is insupportable, either factually or legally.

As the Examining Officer points out, the notes were surrendered and contributed to the capital of Media on December 3, 1968, nearly six months after their organization of the corporation and their issuance. She states that the stockholders in making the contribution to capital were simply recognizing their capital investment in June of 1968. Both Mr. Resor and Mr. Taylor have categorically denied this to be the case. In their affidavits they both state, under oath, that they considered the notes as valid and binding obligations of Media and that they fully expected to be repaid for such loans. Further, they state that the sole purpose of the contribution of the notes to capital was to facilitate the proposed public offering of the stock of MTPS which was being underwritten by Equitable Securities Morton & Co.

Taxpayers' representatives are perfectly aware of and recognize the fact that the Service, in determining whether or not a particular investment in a corporation is to be considered as equity as opposed to debt for purposes of otherwise categorizing for tax purposes payments made in the nature of interest and/or repayment of principal, are not necessarily bound by the stated intentions of the parties involved. We are not aware, however, of any basis or authority, which authorises or permits the Service to alter or redefine the characteristics of a corporate security as it relates to the relationship of the security holder with the corporation and other security holders. The Federal courts will only take jurisdiction of matters involving the relationship of security holders to other security holders in bankruptcy or reorganization situations, and only then to assure the protection of the rights of outside creditors. See, e.g., Boyum v. Johnson, 127 F. 2d 491 (8th Cir. 1942); Arnold v. Phillips, 117 F. 2d 497 (5th Cir. 1941). Thus, absent the "thin" corporation situation in its tax context (in which case the nature or legal relationships incident to the ownership of the security are irrelevant once it is determined to be an "equity" investment) or the bankruptcy context, the legal characteristics and relationships created by the issuance of a security are determined under the statutes and decisions of the law of jurisdiction under which the corporation was created. 13 Fletcher, *Private Corporations* §715; 3 Cavitch, *Business Organizations* §50.01 et seq. 18 Am. Jur. 2d, *Corporations* §§481,482.

The distinction between characterization of a security as an "equity" investment in a "thin" capitalization case and its characterization for other purposes is of more than academic interest in this proceeding. An illustration of the significance of this distinction can be demonstrated easily. Suppose, for example, that the stockholders of Media had determined to sell the stock or assets of MTPS and liquidate Media rather than merge the two companies and take MTPS public. Could Mr. Unger, in the liquidation proceedings, assuming that all outside creditors had been paid off from the proceeds of sale and the notes issued to Mr. Resor and the venture capital corporations were still outstanding, make the same argument made by the Examining Officer here, *i.e.*, that the notes were really equity, as the basis for a claim that he was entitled to one-third of the balance of the proceeds of sale with any real hope of success? We think the answer is obvious that he could not. See *Boyum* v. *Johnson*, *supra* and *Arnold* v. *Phillips*, *supra*.

It is also interesting to note, that in the only other area of tax law of which taxpayers' representatives are aware where the Service has advanced the "debt vs. equity" argument and where the other characteristics of the security were significant, it (the Service) has consistently taken a position directly contrary to the position of the Examining Officer taken here. This is in the "subchapter S corporation" cases where the Service has contended that the debt constituted a second class of stock. In *W. C. Gamman*, 46 T.C. 1 (1966) the court in discussing the Government's position stated:

> ... Respondent relies on the so-called thin capitalization cases, such as *O. H. Kruse Grain & Milling* v. *Commissioner*, 279 F. 2d 123; *Rowan* v. *United States*, 219 F. 2d 51; *Nassau Lens Co.* v. *Commissioner*, 308 F.

> 2d 39; Gilbert v. Commissioner, 248 F. 2d 399; 2554-58 Creston Corp., 40 T.C. 932, to conclude that the purported loans by petitioners to Century House were in reality contributions of additional capital, and that, as a corollary, the notes received by petitioners as evidence thereof were in substance stock, although they were in form debt obligations. Respondent then relies on the formal terms of the instruments to conclude that they gave petitioners rights in the income and assets of the corporation having priority over the rights petitioners had as stockholders, and therefore the notes were a second class of stock.

See also U.S. Treas. Regs. §1.1371-1(g).

The above discussion emphatically points up the fallacy of the Examining Officer's argument which requires as support the "telescoping" of the event of the cancellation of the notes in December, 1968 into the event of their issuance in June, 1968. In order for the Examining Officer to justify her ultimate conclusion that Messrs. Resor and Taylor were "paying their obligation to Mr. Unger" she must: (1) ignore the sworn statements of Messrs. Resor and Taylor; (2) ignore the six months lapse of time between June and December, 1968; and (3) disregard the issuance, the recording in minutes and the payment and reporting of interest on the notes entirely so that the $400,000 can be said to be additional payment for the 400 shares of Media originally issued to Mr. Resor and the venture capital corporations on June 14, 1968.

As indicated previously, Messrs. Resor and Taylor have stated under oath, in direct contradiction of the conclusion of the Examining Officer, that the sole purpose of the contribution of the notes to the capital of Media in December, 1968 was to facilitate the proposed public offering of the stock of MTPS by removing from the balance sheet "Notes to shareholders" as suggested by the underwriter, Equitable Securities, Morton & Co. as a necessary condition to handling the offering. This proposed public offering, although never completed by reason of adverse market conditions which prevailed in the summer of 1969, had it been completed in the context contemplated by the shareholders of Media and the underwriters in late November and early December of 1968, would have resulted in Messrs. Resor and the venture capital corporations each holding stock for which there was an established market of a value on the order of $1,800,000. This was the reason and motivation, according to Messrs. Resor and Taylor, behind the contribution of the notes to the capital of Media, not the discharge of some additional obligation the Examining Officer assumes, and Messrs. Resor and Taylor deny, was owed to Mr. Unger. Whatever obligation Messrs. Resor and Taylor may have had to Mr. Unger incident to the transfer of his rights (or obligation) to acquire the stock of MTPS pursuant to the tender offer, this obligation was fully paid and discharged in June of 1968. They neither recognized nor believed that they had any further or other obligation to Mr. Unger.

The facts incident to the contribution of the notes to the capital of Media by Mr. Resor and the venture capital corporations simply do not support the Examining Officer's thesis. Quite to the contrary, they negate the idea or concept that such contributions were really a payment of additional compensation to Mr. Unger. The facts do indicate and support a determination that the contributions neither were intended nor did confer any benefit in the nature of realized income on Mr. Unger. The intent of the contributions was that they would benefit Mr. Resor and the venture capital corporations by eliminating a clear impediment to the translation of an investment in closely held holding company to an investment in a company whose stock would be traded in an established market. Any indirect benefit that inured to Mr. Unger was purely incidental to the benefit that the other shareholders of Media believed they were obtaining for themselves. In December of 1968 they were faced with a business decision: eliminate the shareholder indebtedness by contributing the notes to the capital of Media and move forward with the public offering of the stock of MTPS; or continue the indebtedness and forego the public offering until the debt was paid. They chose the former course of action as being the alternative in their best interest. They were not required to nor did they obtain Mr. Unger's consent before taking this action.

What was the real effect of this action on Media, Mr. Resor, the Venture Capital companies and Mr. Unger? As to Media, it is clear that it realized no income by reason of its shareholders' contribution to its capital. U.S. Treas. Regs. Sections 1.61-12(a), 1.118-1. Mr. Resor and the venture capital corporations did not realize income, nor incur a "bad debt" loss by reason of the contribution to the capital of Media. See Leo Perlman, 27 T.C. 755 (1956), aff'd. 252 F. 2d 890 (2d Cir. 1958); Dezso Goldner, 27 T.C. 455 (1956); Harry Sackstein, 14 T.C.

566 (1950). The fact that the contributions were non-pro rata does not alter this result. See Leo Perlman, supra; Dezso Goldner, supra; and Harry Sackstein, supra. The contributions do result in an increase in the basis of the contributor's stock. U.S. Treas. Reg. Section 1.118-1. The benefit therefrom inured to Mr. Resor and the venture capital corporations, not Mr. Unger. As the Court of Appeals in the Perlman case stated:

> The cancellation increased the capital of the Company. Petitioners are not without benefit from the transaction because as the Tax Court (Raum, J.), commented "it increased the basis of petitioner's stock, and he will obtain tax benefit therefrom when he subsequently sells or otherwise disposes of his stock in a taxable transaction."

As to Mr. Unger, it seems clear that he might realize benefit from Mr. Resor's and the venture capital corporation action in contributing their indebtedness to the capital of Media. If the public offering of the stock of MTPS had been effected he would have benefited thereby in the same manner as Mr. Resor and the venture capital corporations. Even if the public offering did not take place, he still obtained some benefit simply by reason of the reduction of the total indebtedness of Media. Both of these "benefits", however, are pure and simply an unrealized increase in the value of the stock he held in Media (or following the merger of Media into MTPS) or MTPS.

Unrealized appreciation in the value of property is not income, however. This is one of the cardinal principles of income tax law deriving from a long line of cases beginning with Eisner v. Macomber, 252 U.S. 189 (1919), wherein the Court stated: "... enrichment through increase in value of capital investment is not income in any proper meaning of the term."

In 4 RIA, Tax Co-Ordinator ¶J-1001 the following statement appears:

> A taxpayer who owns appreciated property has no taxable income unless he "realizes" that increment. For example, a taxpayer buys a share of stock for $100. The stock increases in value to $110. So long as he holds his stock, the taxpayer "realizes" no income. In order to "realize" income, there must be a severance of interests. That is to say, there must be different economic interests after the transaction.

The taxpayers submit that the determination by the Examining Officer that they (or Mr. Unger) received additional compensation, over and above the amounts reported, in the amount of $136,666.67 is without merit. The Examining Officer concludes that simply because Messrs Resor and Taylor (the latter through the venture capital corporations) ended up paying more for their stock in MTPS than did Mr. Unger, that the difference in the ultimate cost of the stock constitutes income to Mr. Unger in the nature of additional compensation for services rendered. The facts clearly negate such a conclusion. Admittedly, the taxpayer either rendered services or transferred property rights to Messrs. Resor and Taylor, and for these services or property he was paid in June 1968 $40,000 (whether the payment is treated as compensation or short-term capital gain is immaterial, since the tax effect is the same). Both the taxpayer and the other shareholders of Media believed and understood that this payment was a full and complete discharge of any and all obligations that might have been due and owing to Mr. Unger. They (the other shareholders) had no further financial obligation, either legal or moral, to him. Their actions in effecting contributions to the capital of Media, taken without Mr. Unger's knowledge or assent, were undertaken purely in self-interest and for their own benefit, not Mr. Unger's. The fact that Mr. Unger might also benefit by this action does not support or justify a conclusion that he realized taxable income thereby. It is a fundamental theory of income tax law that it is essential to the taxation of income that it has been realized by the taxpayer to whom it is proposed to tax it. Estate of Florence Carr, 37 T.C. 1173 (1962); Campbell v. Prothro, 209 F. 2d 331 (5th Cir. 1954).

f) District conference requested.

It is requested that determination be made that the Examining Officer's findings, as protested herein, are in error, and that taxpayers' returns as previously adjusted and agreed upon are correct. In the event such determination is not considered possible, a district conference is requested in the District Office at a time convenient to that office.

District Director of Internal Revenue
#18

Re: Sherman and Polly Unger - 1968

Respectfully submitted,

Sherman Unger
Sherman Unger

Polly Unger
Polly Unger

Under penalties of perjury, I declare that I have examined the statement of facts presented in this protest and in any accompanying schedules and statements and, to the best of my knowledge and belief, they are true, correct and complete.

Sherman Unger
Sherman Unger

Polly Unger
Polly Unger

I, Jerry L. Cowan, attorney at law, declare that the foregoing protest was prepared by me, and that to the best of my knowledge and belief, the facts therein set forth and in any accompanying schedules are true, correct and complete.

Jerry L. Cowan
Jerry L. Cowan

(REV. MAR. 1970) 1 C

NAME	TAXABLE YEARS ENDED		
Sherman E and Polly V. Unser		12-31-69	
TAXABLE INCOME OR ADJUSTED GROSS INCOME AS SHOWN IN: ☐ RETURN AS FILED ☒ PRELIMINARY LETTER DATED Nov. 4, 1970 and July 15, 1971 ☐ STATUTORY NOTICE DATED		$226,027.40	
INCREASES (DECREASES) IN INCOME: *(See attached explanation of items)* (a) Services to Co-Investors District Director's Adjustment Eliminated		(136,666.67)	
(b) "Other Property" received in an exchange under Section 351(a) recognized as to its value under Sec. 351(b) of the Code. Holding period over 6 mos. Long term gain. Sec. 1202 Deduction 50%	$11,250 (5,625)	5,625—	
TAXABLE INCOME AS REVISED OR ~~ADJUSTED GROSS INCOME AS REVISED~~		$94,985.73	
TAX COMPUTATION: TAX, Sch G, Income Averaging		$37,541.27	
TAX SURCHARGE — .075%		2,815.60	
TAX PLUS SURCHARGE		$40,356.87	
LESS: TAX CREDITS Investment (Return)		16.07	
SUBTOTAL		$40,340.80	
ADD:			
SELF-EMPLOYMENT TAX		—	
TAX FROM RECOMPUTING PRIOR YEAR INVESTMENT CREDIT		—	
TAX LIABILITY		$40,340.80	
LIABILITY PREVIOUSLY ASSESSED Original Return		16,569.37	
Additional (Agreement 870)		20,748.01	
DEFICIENCY *(Overassessment)*		3,023.42	

Addition to Tax, Sec. 6653(a), Negligence

Total Addition	$1188.57
Previously Assessed	1037.40
Deficiency in Addition to Tax	$151.17

ARTHUR ANDERSEN & CO.

425 WALNUT STREET
CINCINNATI, OHIO 45202
(513) 381-6900

September 8, 1983

Mr. Sherman E. Unger
General Counsel
Room 5870
Department of Commerce
14th & Constitution
Washington, D.C. 20230

Dear Mr. Unger:

Enclosed is a schedule summarizing your taxable income, taxes and credits for the years 1977 through 1982. Please note that these figures are after adjustment for Revenue Agent Revues and IRS adjustments.

If you have any questions, please call.

Very truly yours,

ARTHUR ANDERSEN & CO.

By
D. Eugene Ewing

Enclosure
mad

SHERMAN E. & NANCY M. UNGER
SUMMARY OF TAXABLE INCOME & TAX LIABILITY
1977 - 1982

Year	Taxable Income	Tax Liability	Minimum Tax	ITC Recapture	SE Tax	Credits	Total Tax
1977	$145,486	$65,469	$7,031	$496	$1,304	($6,722)	$67,578
1978	113,420	48,962	5,469	760	462	(5,876)	49,777
1979	138,773	65,310	2,511	654	1,855	(5,177)	65,153
1980	294,205	152,851	None	93	2,098	(2,181)	152,861
1981	205,727	109,540	24,916	410	2,583	(9,625)	127,824
1982 (estimated)	278,810	126,854	5,278	4,000	3,029	(1,000)	138,161
Totals	$1,176,421	$568,986	$45,205	$6,413	$11,331	($30,581)	$601,354
Average	$196,070	$94,831	$7,534	$1,069	$1,889	($5,097)	$100,226

O'MELVENY & MYERS
1800 M STREET, N.W.
WASHINGTON, D.C. 20036-[illegible]
TELEPHONE (202) 457-5300
TELEX [illegible]

400 SOUTH HOPE STREET
LOS ANGELES, CALIFORNIA 90071-[illegible]
TELEPHONE (213) [illegible]
TELEX [illegible]

1800 CENTURY PARK EAST
LOS ANGELES, CALIFORNIA 90067-[illegible]
TELEPHONE (213) [illegible]
TELEX [illegible]

SUITE 1700
610 NEWPORT CENTER DRIVE
NEWPORT BEACH, CALIFORNIA [illegible]
TELEPHONE (714) 760-9600 - (213) [illegible]
TELEX (714) [illegible]

8 PLACE DE LA CONCORDE
PARIS 8e, FRANCE
TELEPHONE [illegible]
TELEX [illegible]

OUR FILE NUMBER

WRITER'S DIRECT TELEPHONE
(202) 457-5325

October
26th
1 9 8 3

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Attention: Robert J. Short

Dear Senator Thurmond:

One of the allegations I discussed in my testimony on behalf of the American Bar Association during the confirmation hearings on September 29, 1983 was that Mr. Unger had directly contacted an opposing party in litigation even though he knew the party was represented by an attorney named Robert G. Stachler, of Cincinnati, Ohio. During my testimony on this subject, Senator Hatch asked for the name of Mr. Stachler's client and the date of the incident. See Tr., Sept. 29, 1983, p. 145. Mr. Stachler has now authorized me to disclose to you that the name of the client involved in this incident is Al Castrucci. The incident took place either in late 1959 or early 1960.

If I can be of further assistance, please let me know.

Sincerely,

William T. Coleman, Jr.

Rec'd
10 10 am
10/27/83
G.[illegible]

cc: Honorable Orrin G. Hatch

GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

October 31, 1983

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Pursuant to the request of Senator Orrin G. Hatch at the closing of the October 27, 1983 hearing, I enclose my written response to the final 16 points of Mr. Coleman's supplemental statement. In addition, I enclose my responses to questions presented by Senator Dole.

I respectfully request that these responses, as well as my supplemental statement of October 27, with exhibits, be placed in the hearing record.

Very sincerely,

Sherman E. Unger

Sherman E. Unger

Enclosures

cc: Honorable Orrin G. Hatch
Honorable Arlen Specter
Honorable Robert Dole
Jonathan C. Rose, Esq.
Dennis F. Mullins, Esq.
Sherrie M. Cooksey, Esq.
Nancy M. Kennedy

Response
of
Sherman E. Unger
to
Mr. Coleman's Sixteen Final Points

1. At the time I answered question 19 of the Personal Data Questionnaire, I was unaware that I had "ever been under Federal, State or local investigation for possible violation of a criminal statute." Subsequent to answering the Personal Data Questionnaire, I learned from Mr. Gilday that I had been a target of a criminal investigation instigated by Jay Rosenberg. I had no recollection of a criminal tax investigation in 1970 and no recollection of receiving Miranda warnings during the brief investigation of the Intelligence Division during that period.

2. As stated in my supplemental statement of October 27, 1983, a tax lien arises only if a taxpayer neglects or refuses to pay tax after demand. I.R.C. § 6321. In addition, after a tax has been assessed, the amount constitutes a lien. I.R.C. § 6322. According to the Internal Revenue Code, "Collection Procedures" consists of liens, levies, or related litigation. See generally, I.R.C. §§ 6200-6300. The Internal Revenue Service (IRS) commences these procedures only after this service is made upon an assessment of taxes for which a taxpayer is liable. Because audit proceedings are taken prior to the assessment of taxes, the action taken by the IRS did not constitute a collection procedure. Likewise, it did not constitute a lien. Accordingly, my answer to question 20 of the Personal Data Questionnaire was correct and the ABA's contention to the contrary is without merit.

3. I read question 22 of the Personal Data Questionnaire as to whether I have "ever been a party or otherwise involved in any other legal proceeding," to refer to actions in which I was a party, or, perhaps, a witness. I provided such information to the Committee. I did not understand the question to include a situation where I was acting as counsel or was named in an injunctive order when acting as counsel for one of the parties, rather than appearing as a party in that litigation.

4. I understood question 23 of the Personal Data Questionnaire with respect to being "disciplined or cited for a breach of ethics or unprofessional conduct, or been the subject of a complaint to, any court, administrative agency, bar association, disciplinary committee, or other professional group," to mean just what the question asks. I did not understand the question to refer to comments made to me during an argument in the United States Court of Appeals for the Third Circuit where that Court did not formally charge me, or discipline me, for a breach of legal ethics.

5. My response to this question is similar to my response to question No. 4. The order in question was drafted by Mr. Welsh and served upon me at 2:30 a.m., at my hotel room on the morning of the day of the hearing. I did not understand the bankruptcy judge's adoption of such an order to constitute a formal charge of ethical violations, nor did I consider it to constitute disciplinary action.

6. Question 29 of the Personal Data Questionnaire is a catch-all question. Because no action was taken by the Third Circuit, or any other court or disciplinary agency with respect to the comments of the court during oral argument, I did not consider such information as having any bearing on my nomination for the Federal Judiciary. As I advised the court during oral argument, I practiced under the rules set by the Third Circuit when I appeared in that Circuit and I practiced under the rules set by the Southern District of Ohio when I appeared in that District. (See, Statement of ABA, Ex. 13, dated September 29, 1983, pp. 33-34.)

7. At the time that I filed my response to the Committee questionnaire, I did not believe that I filed "false affidavits" in the Unit, Inc. and Scioto Park, Ltd. chapter proceedings in the Southern District of Ohio. This same issue was litigated in open

court years earlier and did not result in the conclusion that the affidavits were false. Accordingly, I did not consider them to be false when replying to question 29.

8. I disagree with the factual premise of the ABA's statement with respect to the reason for which Justice Moore resigned as co-counsel in the Freidco proceeding. It was my understanding that Justice Moore resigned from the case because he did not believe that the motion for disqualification should be prosecuted and, therefore, could not represent our client under those circumstances. (See, Affidavit of Justice Andrew G.T.Moore, II, dated February 1, 1980, ¶12.) As I set forth in my Supplemental Statement of October 27, 1983, and in my letter to the Chairman of October 13, 1983, I believe that I did, in fact, have my affidavit corrected in open court. (See, Supplemental Statement of Sherman E. Unger, October 27, 1983, Ex. 24, pp. 43-44.) Accordingly, I did not believe that we were proceeding on the motion to disqualify based upon untrue factual representations in my affidavit. Nor did I believe that disagreement to be covered by question 29.

9. I advised the American Bar Association Committee that the President had relieved me of my responsibilities as General Counsel of the Department of Housing and Urban Development at the request of then Senator Hugh Scott in order to confirm my successor while my nomination to the Federal Communications Commission (FCC) was pending.

10. I did not believe the substance of the Kreider and Berghaussen affidavits, which were first filed in the Donohoo litigation, contained accurate assertions of the facts.
Accordingly, I did not believe there was any reason to advise the Committee that persons had filed such affidavits containing those incorrect facts. However, I did provide the Committee with most, if not all, of the documents relevant to the Donohoo litigation. Thus, I made the Committee aware of all the facts and circumstances surrounding my departure from American Financial Corporation.

11. Mr. Coleman and I have obviously had a failure of communication on this issue. Either I failed to understand his question or he failed to understand my answer. I transmitted to Mr. Coleman the letter of my former associate, Michael G. Kohn, which set forth the factual circumstances under which I first was made aware of the Kreider and Berghaussen affidavits. (See, ABA, supra, Ex. 42.) I simply do not believe that I told Mr. Coleman that I had not seen the affidavits before I executed my own affidavit while, at the same time, giving Mr. Coleman Mr. Kohn's letter which I indicated that I had, in fact seen those affidavits prior to executing my own affidavit. I recall telling Mr. Coleman that the Kreider and Berghaussen affidavits had not been filed prior to the time I executed my own affidavit and that after reading my affidavit I was not sure that my opponents would file the Kreider and Berghaussen affidavits with the court.

12. What I believe I stated to this Committee, in response to a question from Senator Specter, is that the matter contained in the application, if made known to the adverse parties, would have constituted a substantative controverted matter of litigation. (Transcript of hearing before the Committee on the Judiciary, United States Senate, on the nomination of Sherman E. Unger, October 6, 1983, p. 46.) I did not state that my meetings with Judge Gartner involved discussions of substantive, controverted matters of litigation. To the contrary, our conversations involved matters of administration and procedure. When I presented the application to Judge Gartner at his request, I did not discuss the facts or the arguments contained in the memorandum of law, nor did I argue the motion. A more complete response is contained in my Supplemental Statement of October 27, 1983.

13. At the time I made that statement to Mr. Coleman, I had absolutely no recollection of ever receiving fees in a bankruptcy matter without prior court approval. My recollection was imprecise and, in fact, I did receive approximately $12,000 in fees in the Scioto Park matter for which no prior approval had been received.

This was the first $12,000 of a total of $997,000 in fees awarded me by the court and for which prior approval had been obtained for all except the first $12,000. However, the fees paid to me were contained in the monthly reports filed with the court and the court reviewed those reports and did not question the payments to me at any time during the proceeding, nor did any counsel.

14. Again, I disagree with the factual premise stated by the ABA. I do not believe that Mr. Van Dusen and Secretary Romney asked me to resign because I was believed to be untrustworthy. As I stated before this Committee I was widely viewed as the President's man at HUD and I concede that the Secretary, Under Secretary and I did have a number of policy differences. I attempted to follow the President's policy. Whether Mr. Van Dusen and Secretary Romney considered me untrustworthy because of our policy differences, I do not know, but I was not aware that such was the case. I further take issue with the fact that I was asked to resign by Mr. Van Dusen and Secretary Romney because of the conflict of interest opinion written by the Civil Service Commission.

15. With respect to the affidavits in the Unit, Inc. and Scioto Park, Ltd. matters, it was my recollection at the time that I discussed this with the ABA Committee that the affidavits were taken from a form used in personal bankruptcies and that the words "I am not related to" the debtor did, in fact, connote a lack of blood relationship. (See, Supplemental Statement, supra, Ex. 29G.)

16. The ABA is incorrect when it states the Justice Department was not aware of the $40,000 tax matter. As I stated more fully in my Supplemental Statement of October 27, 1983, my response to Mr. Coleman and the ABA Committee was based on their inquiry as to the substance of the tax matter which caused me withdraw my name as a nominee for the Federal Communications Commission. At that time, the $40,000 tax matter had been resolved, and the only issue remaining, and the issue which caused my withdrawal as a nominee to the FCC, was the constructive income matter.

RESPONSES TO SENATOR DOLE'S QUESTIONS

1. One of the important responsibilities of the new court is to serve as a National court of appeals in patent disputes. Would you summarize briefly your background and interests in this field.

I had no particular expertise in patent disputes; however, I have developed a familiarity with the area by working with the Commissioner of Patents and Trademarks while at the Department of Commerce. The Commissioner has written the Judiciary Committee stating his support for my nomination and I attach a copy of that letter. In that letter, the Commissioner states that I have been extremely supportive of the Patent and Trademark Office and that I demonstrated a keen appreciation for the importance of strong and effective protection of intellectual property rights. I might add on my behalf that I compensate to a certain degree by bringing trade law experience to the court, more particularly, that gained while at the Department of Commerce in countervailing duty and dumping cases, i.e., the European steel cases; and sanctions litigation, i.e., the Soviet pipeline sanctions.

2. Another important area of the court's jurisdiction involves government contracts disputes. As a lawyer and counsel for several departments of the federal government, do you feel that you could remain objective in considering this type of case without being biased either for or against the federal government's interests?

I would not feel a bias either for or against the federal government's interests. However, my experience in the federal government does provide me with a better understanding of the process as well as the problems of private parties doing business with the government and would, I believe, better equip me to reach fair and even-handed decisions based upon the facts and the applicable law.

3. Another important area of the court's jurisdiction involves income tax disputes where the taxpayer elects to pay a disputed tax and then file a claim against the government for reimbursement. At least 1/3 of the court's caseload involves these cases. In view of the testimony given in this proceeding so far, do you feel that you could render impartial justice in tax disputes? I apologize for perhaps being repetitive in exploring questions which you have answered already in great detail, but in order to satisfy myself would you briefly summarize again the dispute that you have had with the Internal Revenue Service over your tax returns of 1968. What is the current status of your IRS account? Do you have any outstanding matter in controversy with the IRS? Have all past matters been resolved to the satisfaction of the government?

I recognize the court caseload concerning tax cases and do believe that I could render impartial justice in tax disputes. I recognize the obvious need for revenues and the legal obligation to pay taxes and the complexities involved in resolving certain of those issues. I am confident I would remain dispassionate and impartial on those decisions.

In preparing my 1968 Federal income tax returns on the night of April 15, 1969, I overlooked an unusual $40,000.00 item of income and its resultant deductions. As I began preparation of my 1969 tax return I discovered this omission and in January 1970, I advised the General Counsel of the Department of the Treasury that I failed to include some income in my 1968 tax return. He, in turn, advised me to file an amended return and he also advised the Chief Counsel of Internal Revenue. I filed an amended return on May 20, 1970. After a thorough and complete investigation, the IRS concluded the failure to report the income item was negligence and assessed a 5% negligence penalty to the deficiency. During the course of this investigation, the auditor raised a constructive income issue alleging that I had realized ordinary income in the form of increased equity or property interests for services rendered in the amount of $136,667.00. After the filing of a protest and taking the matter from the auditor level to the administrative appellate level, the matter was disposed of by payment of slightly less than $3,100.00 to the satisfaction of the IRS and myself.

The current status of my IRS account is paid in full. To the best of my knowledge, I have no personal matters in controversy with the IRS although I have granted extensions on several years in which oil partnership returns were being examined. All past matters they have raised have been resolved to the satisfaction of the government. I attach a summary prepared by Arthur Andersen & Company pertaining to my taxable income, taxes, and credits for the years 1977 - 1982. I call to your attention the fact that during these years over 50% of my taxable income was paid as federal income tax.

4. Another area of concern involves your potential for sound judicial temperament and demeanor. I understand that you have been an advocate in a number of hotly disputed civil actions which have sometimes resulted in complaints from opposing counsel. Have you ever been censored by a judge in whose court you appeared? Or been subject to disciplinary proceedings by any bar association -- federal, state, or local? As a general counsel for three departments of government, have you ever presided over any administrative tribunals? If so, have any charges ever been made concerning your conduct or demeanor during those proceedings?

I have not been censored by a judge in whose court I have appeared nor, to the best of my knowledge, has a disciplinary proceeding by any bar association -- federal, state or local --

been instituted. I am advised, however, that the Office of Bar Counsel of the District of Columbia Bar has asked for a review of the transcripts of instant hearing. I have not been personally contacted by the District of Columbia Bar. As a general counsel of the federal government, I have never presided over an administrative tribune, although I do believe I have a solid judicial temperament and demeanor.

5. Mr. Unger, one of the ongoing responsibilities of the Courts Subcommittee involves oversight of the federal bankruptcy code. You have been specifically criticized for your conduct in a 1977 bankruptcy proceeding. The details of the matter have been placed in this hearing record. I will not go over the same grounds again. However, I want to ask the following: Have you been involved in bankruptcy proceedings since the enactment of the 1978 Act? If so, would you contrast the practice and procedure under the 1978 Act as opposed to previous practice. I have in mind in particular ex parte communication between counsel and bankruptcy judge or referee.

I was involved in one Chapter 11 proceeding under the Bankruptcy Code of 1978. The practice and procedure under the 1978 Code differs substantially from that under the prior bankruptcy act. The interim rules proposed by the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States contained a specific proposed rule, Rule 5001, which provided that parties in interest shall refrain from ex parte meetings and communications with the bankruptcy judge concerning matters affecting a particular case or civil proceeding. Under the Bankruptcy Code of 1978 the administrative function previously exercised by bankruptcy judges was delegated to a new United States Trustee. Although the United States Trustees were established in only a few pilot districts under the Code, the intent of the Code, as gleaned from the act and the legislative history, was designed to separate the bankruptcy judges from administration of the estate. The Code intended that the bankruptcy judges would retain solely an adjudicative function, while United States Trustees, or some equivalent, would be responsible for the administration of the proceeding. In my brief appearance in that one bankruptcy matter under the new Code, I strictly adhered to the intent of the Code and I did not engage in any ex parte communications with the bankruptcy judge.

RESPONSE OF SHERMAN EDWARD UNGER TO WRITTEN STATEMENT OF MORRIS M. BERGER AND MICHAEL HAHALYAK

Messrs. Morris M. Berger and Michael Hahalyak have submitted a statement regarding my participation in the Unit, Inc. Chapter XI proceeding involving a Kentucky limited partnership known as B & B Properties. A large number of the factual assertions contained in their statement are incorrect, particularly those asserting that I obtained two *ex parte* orders from the court.

Messrs. Hahalyak and Berger state that in 1971, B.W. Morris was a client of mine.[1/] In 1971, I was employed by American Financial Corporation and was not engaged in the private practice of law. I did not meet Mr. Morris for the first time until late in 1972, or 1973 and I have represented him personally in only one limited matter, which occurred in 1978 or 1979.

Messrs. Hahalyak and Berger state that prior to June 1980, I had been negotiating on behalf of Unit, Inc. for the sale of the Patchen Place Apartments, owned by B & B Properties, to a partnership known as the Patchen Investment Group.[2/] I did not negotiate

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[1/] Exhibit 1, Statement of Morris M. Berger and Michael Hahalyak in re: Appointment of Sherman Unger, Esq., dated October 21, 1983, at 1.

[2/] *Id.* at 2.

or participate in those negotiations. Those negotiations were conducted by Mr. Morris and a representative of either the Patchen Investment Group or a broker representing the Group.

Messrs. Hahalyak and Berger state that the negotiations were consummated by me in a "Land Contract" between Unit and the Patchen Investment Group dated May 12, 1980.[3] I did not "consummate the negotiations," nor did I draft the "Land Contract." I did notarize Mr. Morris' signature on the "Land Contract."

Messrs. Hahalyak & Berger refer to "the ex parte order of June 19, 1980, obtained from Judge Gartner by Mr. Unger" and further refer to an ex parte hearing.[4] The facts are as follows: On June 9, 1980, Unit, Inc. filed an application for approval to sell the assets of B & B Properties in the Office of the Clerk of the United States Bankruptcy Court for the Southern District of Ohio, Western Division.[5] On June 19, 1980, the Clerk of the Bankruptcy Court prepared and distributed a notice of hearing with respect to Unit's application, as well as with respect to another application filed by Unit, Inc. The notice was directed "TO ALL CREDITORS OF THE ABOVE DEBTOR AND PARTIES IN INTEREST" and was distributed in accordance with the Court's service list.[6] On June 19, 1980, the hearing was held in accordance with the Court's notice. One creditor representative appeared, but did not object.[7] On June 19, 1980, following the hearing, the court entered its order authorizing the sale of the assets of B & B Properties.[8] The court approved the transaction "with full assurance and knowledge that the limited partners would be notified and given an opportunity to object to the transaction."[9] That same day, Unit, Inc. wrote the limited partners and enclosed the copy of the Court's order.[10] Those limited partners who decided to object did so and the court scheduled proceedings on the merits of the objections.[11]

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[3] Id.

[4] Id. at 3.

[5] Exhibit 2, Application for Authorization of the Sale of the Assets of B & B Properties, filed in the Matter of Unit, Inc., No. B 1-75-1989 on June 9, 1980.

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[6] Exhibit 3, Notice of Hearing on Application for Authority to Exchange Partnership Interests and Application for Authorization for the Sale of the Assets of B & B Properties, in the Matter of Unit, Inc., No. B 1-75-1989, dated June 9, 1980.

[7] Exhibit 4, Order with Respect to Sale of B & B Properties and Fixing Hearing Date on Objections of Limited Partners, entered, in the Matter of Unit, Inc., No. B 1-75-1989, on July 25, 1980, at 1.

[8] Exhibit 5, Order Authorizing the Sale of the Assets of B & B Properties, entered in the Matter of Unit, Inc., No. B 1-75-1989, on June 19, 1980.

[9] *See* Exhibit 4, *supra*, at 1-2.

[10] Exhibit 6, letter from B.W. Morris of Unit, Inc., to Limited Partners of B & B Properties, dated June 19, 1980.

[11] *See* Exhibit 4, *supra*.

Messrs. Hahalyak and Berger state that on August 11, 1980, "Mr. Unger, on behalf of Unit, Inc., filed another ex parte Application without prior notice to the Limited Partners or their counsel."[12] The Application to Withdraw filed on that date contained the required certificate of service which certified that a copy of the application was served on Messrs. Hahalyak and Berger.[13]

Messrs. Hahalyak and Berger further state that I appeared "again ex parte, in Judge Gartner's court room (or chamber) and requested an Order from him to withdraw."[14] I have no recollection of any such appearance, nor was I aware of any telephone conversation between Judge Gartner and Mr. Berger. I assume that Judge Gartner read our Application to Withdraw and telephoned Mr. Berger, as was his practice, to inquire whether there would be any opposition to the Application. Messrs. Hahalyak and Berger filed written responses to the application to withdraw[15] and I filed a reply memorandum on August 20, 1980 on behalf of Unit, Inc. The reply memorandum contained a certificate of service certifying that a copy of the reply memorandum was served on Messrs. Hahalyak and Berger.[16] Judge Gartner's order on the application was entered the next day.

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[12] See Exhibit 1, Statement of Messrs. Hahalyak and Berger, supra, at 4.

[13] Exhibit 7, Application to Withdraw, filed in the Matter of Unit, Inc., No. B 1-75-1989, on August 11, 1980.

[14] See Exhibit 1, Statement of Messrs. Hahalyak and Berger, supra, at 5.

From the foregoing it is clear that at no time did I engage in *ex parte* contacts as stated by Messrs. Hahalyak and Berger. My application for authorization was handled in accordance with the provisions of Bankruptcy Rule 11-54(b). The hearing was noticed by the court and held in open court. The court's order was transmitted to the limited partners offering them the opportuni to object to the transaction. The court agreed to hold proceeding including discovery and a hearing, on those objections. Furthermo the documents clearly show service of the application to withdraw, as well as all other contested filings, on opposing counsel. The statement of Messrs. Hahalyak and Berger appears to violate Ethical Consideration 8-6 and may violate Disciplinary Rule 8-102.

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[15] Exhibit 8, Answer to Application to Withdraw and Memorandum in Support of Answer to Application to Withdraw, in the Matter of Unit, Inc., No. B 1-75-1989, served August 15, 1980.

[16] Exhibit 9, Reply Memorandum in Support of Application to Withdraw, filed in the Matter of Unit, Inc., No. B 1-75-1989, on August 20, 1980.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Jun 9 [illegible]

IN THE MATTER OF: : No. B-1-75-1989
:
UNIT, INC., : IN PROCEEDINGS FOR
: AN ARRANGEMENT
Debtor. : UNDER CHAPTER XI

APPLICATION FOR AUTHORIZATION OF THE SALE OF THE ASSETS OF B & B PROPERTIES

Unit, Inc., Debtor-in-Possession, by and through its counsel, applies to this Honorable Court for an order authorizing the sale of certain real property owned by B & B Properties, a limited partnership of which Unit, Inc. is the general partner, in accordance with the terms of the land contract attached hereto. A memorandum of law in support of this application is attached hereto.

WHEREFORE, Unit, Inc. prays that this Honorable Court will enter its order authorizing the sale of the real property owned by B & B Properties described in the attached land contract.

Sherman E. Unger
Trial Attorney for Unit, Inc.
2820 DuBois Tower
Cincinnati, Ohio 45202
Phone: (513) 241-0820

OF COUNSEL:

Michael G. Kohn
2820 DuBois Tower
Cincinnati, Ohio 45202

EXHIBIT 1

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF ALLEGHENY)

BEFORE ME, the undersigned authority, personally appeared the undersigned affiants, who, being duly sworn according to law, depose and say that the averments in the the attached statement are true and correct according to their knowledge, information and belief.

Morris M. Berger
MORRIS M. BERGER (SEAL)

MICHAEL HAMALYAK (SEAL)

SWORN to and subscribed
before me this 21th day
of October, 1983.

Janet L. Christensen
NOTARY PUBLIC

JANET L. CHRISTENSEN, NOTARY PUBLIC
PITTSBURGH, ALLEGHENY COUNTY
MY COMMISSION EXPIRES MAY 23, 1985
Member, Pennsylvania Association of Notaries

JUN 19 '80
[illegible] JUDGES
[illegible] OHIO

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN THE MATTER OF:	:	No. B-1-75-1989
	:	
UNIT, INC.,	:	IN PROCEEDINGS FOR
	:	AN ARRANGEMENT
Debtor.	:	UNDER CHAPTER XI

ORDER AUTHORIZING THE SALE OF THE ASSETS OF B & B PROPERTIES

At Cincinnati, in said District, on this 19th day of June, 1980:

On June 9, 1980, Unit, Inc., Debtor-in-Possession, filed a motion pursuant to Rule 11-54(b) of the Rules of Bankruptcy Procedure, for authorization of the sale of certain real property owned by B & B Properties, a limited partnership of which Unit, Inc. is the general partner. According to the terms of the Land Contract, the purchase price for this real estate is $5,300,000.00. B & B Properties will receive the sum of $1,000,000.00 cash upon closing, less closing costs and fees. Of this sum, Unit will receive approximately $500,000.00 in cash as partial payment of an $800,000.00 non-interest bearing obligation of B & B Properties to Unit. Approximately $100,000.00 will be paid to the limited partners of B & B Properties.

The purchaser of the real estate will assume the first mortgage on the premises. The balance of the purchase price, $675,000.00, will be evidenced by the purchasers' negotiable promissory note, secured by a subordinated vendor's lien, payable to the order of B & B Properties, bearing interest at the rate of ten percent per year.

A hearing was held on this application on June 19,

1980. From Debtor's application and this hearing, this Court has determined that the sale of the real estate in accordance with the terms of the Land Contract is fair and reasonable. The sale is in the best interest of Unit and its creditors as it will permit Unit to receive a substantial amount of cash which otherwise would not be available to it over the short term and will allow Unit to receive additional monies over the next months as payments on the promissory note fall due.

In addition, this Court has determined that this sale is in the best interest of B & B Properties, as it is so material to the rehabilitation of Unit, Inc. Therefore, absent the most extraordinary reasons, it would be unreasonable for any limited partner of B & B Properties to withhold consent for this sale.

Accordingly, it is

ORDERED that Debtor's application for authorization of the sale in accordance with the terms of the Land Contract, is sustained and because this sale is of such importance to Unit's rehabilitation, Unit is directed to proceed with the sale in accordance with the terms of the Land Contract.

It is

FURTHER ORDERED that, as this Court finds that the sale is fair, reasonable and material to the rehabilitation of Unit, Inc., and, as this Court finds that absent an extraordinary reason, it would be unreasonable for any limited partner of B & B Properties to withhold consent for this sale, any limited partner seeking to withhold consent is directed to notify Unit, Inc. and this Court of his decision to withhold consent prior to June 30, 1980. Absent any such notification, all limited partners of B & B Properties will be deemed to have consented to this sale.

IT IS SO ORDERED.

Leonard C. Gartner
Bankruptcy Judge

EXHIBIT 2

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN THE MATTER OF:	:	No. B-1-75-1989
	:	
UNIT, INC.,	:	IN PROCEEDINGS FOR
	:	AN ARRANGEMENT
Debtor.	:	UNDER CHAPTER XI

MEMORANDUM OF LAW

Unit, Inc. ("Unit") is the sole general partner of B & B Properties, a Kentucky limited partnership. B & B Properties was formed in 1971 for the purpose of engaging in real estate development, more particularly to develop certain real estate in Fayette County, Kentucky, commonly known as Patchen Place Apartments. Unit holds a 25% interest in the partnership. In addition, B & B Properties is indebted to Unit in the sum of approximately $800,000.00 in non-interest bearing obligations.

Bankruptcy Rule 11-54(b) provides that

> "The Court may, on such notice as it may direct and for cause shown, authorize . . . debtor-in-possession to lease or sell any real or personal property of the debtor on such terms and conditions as the court may approve."

It will be in the best interests of Unit and its creditors for this Court to approve the sale of the Patchen Place Apartments in accordance in the terms and conditions set out in the land contract, attached hereto.

The purchase price for the Patchen Place Apartments is $5,300,000.00. B & B Properties will receive the sum of $1,000,000.00 cash upon closing, less closing costs and fees. Of this sum, Unit will receive approximately $500,000.00 in cash as a partial payment of B & B's obligation. Approximately $100,000.00 will be paid to the limited partners. In addition to the cash payment, the purchaser will assume the first mortgage on the premises. The balance of the purchase price, $675,000.00, will be evidenced by the purchaser's negotiable promissory note payable to the order of B & B Properties, bearing interest at the rate at 10% per year. One half the principal is due on or before January 15, 1982 and the balance is due on or before January 15, 1983. The note will be secured by a subordinated vendor's lien.

This sale is in the best interests of Unit and its creditors. Approval of the proposed sale will permit Unit to receive a substantial amount of cash which otherwise would not be available to it over the short term. Moreover, Unit will receive additional monies over the next thirty months as payments on the promissory note fall due.

Under the provisions of the limited partnership agreement, this proposed sale must be approved by the limited partners of B & B Properties whose consent may not be unreasonably withheld. Because Debtor believes that the proposed sale offers the best opportunity for recouping its investment in B & B Properties, it is respectfully submitted that this Court find that only the most extraordinary reasons would justify withholding consent. Cf. In re Dutch Inn of Orlando, Ltd., 614 F.2d 506 (5th Cir. 1980).

The purchaser is seeking a July 1, 1980 closing date for this proposed sale. Therefore, it is respectfully requested that this Court set a hearing on this application at the earliest possible date. Because this sale is inherently reasonable and in the best interests of B & B Properties, Unit, and the creditors of Unit, this Court's expedient authorization of the sale is requested.

WHEREFORE, Debtor prays that this Honorable Court will enter its order setting this matter for a hearing and following that hearing, enter its findings that the proposed sale is in the best interest of Debtor and that it would be unreasonable to withhold consent and enter its order approving Debtor's application for authorization to consummate the sale of the real property owned by B & B Properties.

Sherman E. Unger
Trial Attorney for Unit, Inc.
2820 DuBois Tower
Cincinnati, Ohio 45202
Phone: (513) 241-0820

OF COUNSEL:

Michael G. Kohn
2820 DuBois Tower
Cincinnati, Ohio 45202

LAND CONTRACT

THIS LAND CONTRACT, made and entered into this 8th day of May, 1980, by and between B & B PROPERTIES, a Kentucky partnership, of Lexington, Fayette County, Kentucky, hereinafter called "Seller," and PATCHEN INVESTMENT GROUP, a Kentucky general partnership of Lexington, Fayette County, Kentucky, hereinafter called "Purchaser."

W I T N E S S E T H

THAT the Seller, in consideration of the payments to be made and the covenants and agreements by the Purchaser to be performed, as hereinafter set forth, hereby sells and agrees to convey unto the Purchaser, and the Purchaser agrees to purchase upon the following terms and conditions, the following described real estate in Fayette County, Kentucky, to-wit:

> That certain apartment complex known as the Patchen Place Apartments, Lexington, Kentucky, consisting of 202 units and other related improvements and all related items used in the operation of such apartments, including all office equipment, furnishings, tools, lawn equipment, snow removal equipment, cleaning equipment, swimming pool equipment, maintenance supplies, motor vehicles, and all appliances including stoves, refrigerators, washers and dryers, the real property upon which such apartment complex is located being described as follows:
>
> Lot 1, Block "D", Tract 1 containing 10.710 acres and Lot 1, Block "C", Tract 2 containing 4.604 acres, Dallas Plaza Subdivision, Unit 2 of record in Plat Book 23, Page 54, in the office of the Clerk of the Fayette County Court and of record in Plat Cabinet A, Slide 298, in said clerk's office. including [illegible] of record in Plat Cabinet B, Slide 70
>
> Being the same property conveyed to B & B Properties by B & B Properties, Inc., by deed of record in Deed Book 1034, Page 418, in the office of the Clerk of the Fayette County Court.

1. **ESCROW DEPOSIT**. Purchaser has deposited the sum of Five Thousand Dollars ($5,000.00) with Russ Dunn

EXHIBIT A

Realtor to be held by Russ Dunn Realtor as Escrow Agent and Purchaser shall deposit an additional sum of Ninety-five Thousand Dollars ($95,000.00) with Russ Dunn Realtor upon completion of inspection as provided in paragraph 2 below. Russ Dunn Realtor, as Escrow Agent, agrees to abide by all the terms and conditions of this contract., Upon completion of inspection, Russ Dunn Realtor shall deposit such total sum of One Hundred Thousand Dollars ($100,000.00) in an income producing account with the American Bank & Trust Company, Lexington, Kentucky, the proceeds of such account to be applied to the purchase price upon closing or refunded to Purchaser should title prove not merchantable.

2. INSPECTION. Seller will allow Purchaser to inspect the books and records relating to the operation of the above apartment complex and to inspect such apartment complex during the ten (10) working days following the date this offer is accepted. During this ten (10) working day period, Purchaser shall have the right to declare this contract null and void. After this time, except as provided in paragraph 7 below, this contract is non-cancellable. In the event Purchaser elects to declare this contract null and void, it shall notify the Seller and Russ Dunn Realtor by certified mail, return receipt requested, of its intention to declare this contract void and this contract shall thereupon become null and void.

3. PURCHASE PRICE. The purchase price is Five Million Three Hundred Thousand Dollars ($5,300,000.00) and shall be paid as follows:

A. The sum of One Million Dollars ($1,000,000.00) shall be paid upon closing, which shall be held on or before July 1, 1980 upon at least ten (10) days written notice by the Purchaser to the Seller.

B The Purchaser shall assume and agree to satisfy that certain indebtedness of Seller to the Kissell Company secured by a first mortgage upon the above premises in the principal amount of approximately Three Million Six Hundred Twenty-five Thousand Dollars ($3,625,000.00). Seller shall obtain the written consent of The Kissell Company for Purchaser to assume such indebtedness.

C. The balance of the purchase price in the approximate amount of Six Hundred Seventy-five Thousand Dollars ($675,000.00) shall be evidenced by the negotiable promissory note of Purchaser payable to the order of Seller, bearing interest at the rate of ten percent (10%) per annum, payable annually. Purchaser and each of its partners shall assume personal liability for this note. The principal balance of this note will be paid as follows: Three Hundred Thirty-seven Thousand Five Hundred Dollars ($337,500.00) to be paid on or before January 15, 1982; Three Hundred Thirty-seven Thousand Five Hundred Dollars ($337,500.00) to be paid on or before January 15, 1983. Purchaser may pay the entire unpaid balance of such note or any part thereof at any time without penalty.

D. The above note in the amount of Six Hundred Seventy-five Thousand Dollars ($675,000.00), and the remaining balance of said note as set out in the above described payment schedule, will be secured by a Vendor's Lien retained in the deed from Seller to Purchaser. The Seller will allow the Purchaser to place a second mortgage upon the above described property and this second mortgage will be superior in claim and precedence to the above described Vendor's Lien. The Purchaser will be personally and jointly responsible for all of the terms and conditions of this second mortgage and will hold the Seller harmless of all claims pertaining to the terms and conditions and payment of this second mortgage.

4. PRORATION AND SECURITY DEPOSITS. All rents shall be prorated to date of closing. Property taxes coming due in the fiscal year 1980-1981 shall be prorated to date of closing with Seller paying to Purchaser or Purchaser paying to Seller the amount owing at closing. Purchaser shall pay such taxes in full when they come due in approximately November, 1980. Seller shall transfer to Purchaser upon closing all security deposits of tenants who occupy the apartment complex.

5. POSSESSION OF PROPERTY. Purchaser shall take Landlord's possession of the above premises and related

items upon making the payment provided in paragraph 2a above.

6. TITLE TO PROPERTY. Upon closing, Seller shall execute and deliver to Purchaser a general warranty deed to the above described real property and a bill of sale to the above described personalty which shall convey same to Purchaser free and clear of all encumbrances of every kind and description excepting only the following:

A. The aforesaid mortgage to The Kissell Company.

B. The aforesaid Vendor's Lien retained by Purchaser.

C. Easements of record relating to the above described realty.

D. State of Kentucky and Lexington-Fayette Urban County ad valorem taxes coming due in the year 1980 which shall be prorated as hereinafter provided.

Seller and Purchaser agree that Purchaser may not wish to record the aforesaid deed upon closing. In such event, Purchaser and Seller shall execute a memorandum of land contract in such form as will be recordable in the office of the Clerk of the Fayette County Court and such memorandum of land contract shall be delivered to Purchaser for recording upon closing. The general warranty deed will be held by John Morgan, Esq., as Escrow Agent.

7. SELLER'S COVENANT. The Seller covenants that it will not further encumber the above premises and that it will obtain the written consent of The Kissell Company for purchaser to assume the indebtedness described in paragraph 3 above. In the event such consent is not obtained within 30 days from the date of acceptance of this agreement, the Purchaser may, at its option, declare this agreement null and void and the deposit provided in paragraph 1 above shall be returned to Purchaser.

8. PURCHASER'S COVENANT. The Purchaser hereby agrees that during the duration of this agreement it will:

A. Pay all ad valorem property taxes upon such property including State of Kentucky, Lexington-Fayette Urban County Government taxes before the the same become delinquent and to furnish to Seller receipts evidencing such payment. Seller has paid such taxes which came due in the year 1979 and theretofore and taxes coming due in the year 1980 shall be prorated between the parties.

B. Keep the premises free and clear of any and all liens which are or might become superior to the rights of Seller under this contract.

C. Not commit any waste nor suffer any waste to be committed upon such premises.

9. INSURANCE. The Purchaser will keep the improvements on the above described premises insured against loss by fire and extended coverage in at least the amount of the unpaid balances of the indebtedness to The Kissell Company, the Seller and any second mortgagee. The Purchaser will also keep a liability policy in force in the amount of One Hundred Thousand Dollars ($100,000.00) each person, and Three Hundred Thousand Dollars ($300,000.00) each occurence. Seller is to be named in each of the above required policies and have the right to make payments due on the policies in the event of default by Purchaser..

10. MODIFICATIONS. No extension, change, modification or amendment to or of this instrument of any kind whatsoever shall or will be made or claimed by the Purchaser, and no notice of any extension, change, modification or amendment, made or claimed by the Purchaser shall have any force or effect whatsoever except the same shall be endorsed in writing on this agreement and be signed by the parties hereto.

11. INSOLVENCY. In the event Purchaser shall be or become bankrupt, become insolvent, make an assignment for the benefit of creditors or institute proceedings for reorganization under the federal Bankruptcy statutes as may exist during the duration of this agreement then same shall constitute a default hereunder and Seller shall have

all the remedies herein granted as well as all remedies available in law or equity.

12. RECEIVERSHIP. Upon the commencement or during the pendancy of any action under this Contract, the Court shall appoint upon the application of Seller, a receiver of the premises and shall empower the receiver to collect the rents, issues and profits of said premises during the pendancy of such action, and order such rents, issues and profits when so collected, to be held and applied as the Court shall, from time to time, direct.

13. BINDING EFFECT. All terms, conditions, covenants, warranties and promises herein shall be binding upon and inure to the benefit of the heirs, legal representatives, successors and assigns of the Seller and the Purchaser.

14. ASSIGNABILITY. The Purchaser shall have the right to assign this contract without the consent of Seller, provided, however, that in the event of such assignment Purchaser shall remain liable upon this contract.

15. REAL ESTATE COMMISSION. The Seller shall pay Russ Dunn Realtor, Lexington, Kentucky, a real estate commission in the amount of $300,000.00. This commission will be paid in three installments. The sum of One Hundred Thousand Dollars ($100,000.00) will be paid at the closing on or before July 1, 1980. The sum of One Hundred Thousand Dollars ($100,000.00) with interest at 10% per annum on the unpaid balance, payable annually shall be paid on or before January 15, 1982. The sum of One Hundred Thousand Dollars ($100,000.00) with interest at 10% per annum on the unpaid balance, payable annually will be paid on or before January 15, 1983. In the event the Purchaser should pay to Seller the entire unpaid balance of the purchase price prior to January 15, 1983 then the Seller will pay the balance of such real estate commission to Russ Dunn Realtor, simultaneously with the payment in full of the balance of the indebtedness of Purchaser to Seller.

16. APPROVAL REQUIRED. Purchaser recognizes that Unit, Inc., general partner of Seller, is a Debtor-in-Possession in a proceeding for a Chapter XI arrangement in the United States Bankruptcy Court for the Southern District of Ohio, and that this contract is conditioned upon securing the approval of the United States Bankruptcy Court for the Southern District of Ohio and the limited partners of Seller to all the terms and conditions hereof.

17. OFFER TO PURCHASE. This Land Contract when executed by Purchaser shall constitute an offer to Seller to purchase the above described premises and related items upon the terms and conditions provided herein. Such offer may be accepted by Seller by executing two (2) copies of this agreement and returning the same to Purchaser on or before the 12th day of May, 1980.

IN WITNESS WHEREOF, the parties hereto have executed this Land Contract in multiple copies, each copy to have the force and effect of an original, on the day and year first above written.

B & B PROPERTIES
UNIT INC Gen. Partner
By
Partner

PATCHEN INVESTMENT GROUP

By
Partner

By
Partner

By
Partner

RUSS DUNN REALTOR

By

STATE OF *Ohio*)
) SS.
COUNTY OF *Hamilton*)

The foregoing instrument was acknowledged before me this *8th* day of *May*, 1980, by *B. W. Morris*, Partner, on behalf of B & B Properties.

Notary Public, State of *Ohio*

STEPHEN [illegible], Attorney at Law
NOTARY PUBLIC - STATE OF OHIO
My Commission has no expiration
Date. Section 147.03 R. C.

STATE ~~OF~~ *At Large - Ky.*)
) SS.
~~COUNTY OF~~)

The foregoing instrument was acknowledged before me this *12th* day of *May*, 1980, by [illegible], Partner, on behalf of Patchen Investment Group.

Notary Public, State of *Kentucky*

STATE OF *At Large - Ky.*)
) SS.
~~COUNTY OF~~)

The foregoing instrument was acknowledged before me this *12th* day of *May*, 1980, by [illegible], Partner, on behalf of Patchen Investment Group.

Notary Public, State of *Kentucky*

STATE OF __________)
) SS.
COUNTY OF __________)

The foregoing instrument was acknowledged before me this _____ day of ______, 1980, by ________________, Partner, on behalf of Patchen Investment Group.

Notary Public, State of ________

STATE OF [illegible])
) SS.
~~COUNTY~~ OF __________)

The foregoing instrument was acknowledged before me this [illegible] day of May, 1980, by Russell E. [illegible], on behalf of Russ Dunn Realtor.

Notary Public, State of [illegible]

EXHIBIT 3

52

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN THE MATTER OF:) In Proceedings For An Arrangement Under Chapter XI

Unit, Inc.)

Debtor) No. B-1-75-1989

NOTICE OF HEARING ON APPLICATION FOR AUTHORITY TO EXCHANGE PARTNERSHIP INTERESTS AND APPLICATION FOR AUTHORIZATION FOR THE SALE OF THE ASSETS OF B & B PROPERTIES

TO ALL CREDITORS OF THE ABOVE DEBTOR AND PARTIES IN INTEREST:

NOTICE IS HEREBY GIVEN THAT the debtor, through counsel, Sherman E. Unger, filed the above identified applications in this Court. The applications are lengthy and they are available to creditors and any party in interest for inspection in the Office of the Clerk, Room 735.

Accordingly, this matter has been set for hearing before Leonard C. Gartner, U. S. Bankruptcy Judge, Room 721, Court Room #2, United States Post Office and Court House Building, Fifth and Walnut Streets, Cincinnati, Ohio, on June 19, 1980 at 10:00 A. M.

ARNOLD M. MALECH
CLERK OF THE BANKRUPTCY COURT

BY Gail Williams
Deputy Clerk

June 9, 1980

RECEIVED
JUN 1 [illegible]
RECEIVED

EXHIBIT 4

[illegible] 10

JUL 25 '80
BANKRUPTCY JUDGES
CINCINNATI, OHIO

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN THE MATTER OF :

UNIT, INC., : Bankruptcy No. B-1-75-1989

Debtor. :

ORDER WITH RESPECT TO SALE OF B & B PROPERTIES AND FIXING HEARING DATE ON OBJECTIONS OF LIMITED PARTNERS.

At Cincinnati, in said District, on July 24, 1980:

On June 9, 1980 the debtor filed an application for the sale of the premises which are the subject of this order, as therein set forth.

In the memorandum attached to the application is the following statement:

> "This sale is in the best interests of Unit and its creditors. Approval of the proposed sale will permit Unit to receive a substantial amount of cash which otherwise would not be available to it over the short term. Moreover, Unit will receive additional monies over the next thirty months as payments on the promissory note fall due.
>
> Under the provisions of the limited partnership agreement, this proposed sale must be approved by the limited partners of B & B Properties whose consent may not be unreasonably withheld. Because Debtor believes that the proposed sale offers the best opportunity for recouping its investment in B & B Properties, it is respectfully submitted that this Court find that only the most extraordinary reasons would justify withholding consent. Cf. In re Dutch Inn of Orlando, Ltd., 614 F. 2d 506 (5th Cir. 1980).
>
> The purchaser is seeking a July 1, 1980 closing date for this proposed sale. Therefore, it is respectfully requested that this Court set a hearing on this application at the earliest possible date. Because this sale is inherently reasonable and in the best interests of B & B Properties, Unit, and the creditors of Unit, this Court's expedient authorization of the sale is requested."

JUL 25 1980

The hearing was held on June 19, 1980 pursuant to notice. Present were counsel for the debtor and a creditor representative the latter who did not object. Counsel for the debtor reiterated at the hearing much of which was averred in the application.

As a result, the Court approved the application by the order of June 19, 1980, with full assurance and knowledge that the limited partners would be notified and given an opportunity to object to the transaction.

They did, and like a tornado.

Whether or not their lack of consent is unreasonable or that they have standing to object under the partnership agreement will be the subject of an evidentiary hearing. The Court has in the past granted the debtor and its affiliates every opportunity to unfold their advocacy. It will not deny that to the partners herein.

The Court has viewed notices of depositions. It has been informed of the necessity for discovery. It recognizes the not too simple legal problems herein.

The hearing on the objections will be held on Monday, October 20, 1980 in Room 721, U. S. Post Office and Courthouse, 5th & Walnut Streets, Cincinnati, Ohio at 10:00 A.M.

The Court believes that this order obviates the necessity to rule on other miscellaneous documents filed in connection with this controversy.

Observations

1. So far as the record herein is concerned, B & B Properties is a viable, operating partnership;

2. Debtor has only a 25% interest therein;

3. Debtor has been managing the real estate and receives a fee therefore (Interim Reports);

4. While the application of June 9, 1980 requests authorization of a sale of the premises, the document attached is entitled "Land Contract" with payment over an extended time -- the tax consequences?

5. Are there alternative methods of solving the mutual problems of the parties.

SO ORDERED.

Bankruptcy Judge

EXHIBIT 5

ENTERED

JUN 19 '80
BANKRUPTCY JUDGES
CINCINNATI, OHIO

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN THE MATTER OF: : No. B-1-75-1989
:
UNIT, INC., : IN PROCEEDINGS FOR
: AN ARRANGEMENT
Debtor. : UNDER CHAPTER XI

ORDER AUTHORIZING THE SALE OF THE ASSETS OF B & B PROPERTIES

At Cincinnati, in said District, on this ____ day of June, 1980:

On June 9, 1980, Unit, Inc., Debtor-in-Possession, filed a motion pursuant to Rule 11-54(b) of the Rules of Bankruptcy Procedure, for authorization of the sale of certain real property owned by B & B Properties, a limited partnership of which Unit, Inc. is the general partner. According to the terms of the Land Contract, the purchase price for this real estate is $5,300,000.00. B & B Properties will receive the sum of $1,000,000.00 cash upon closing, less closing costs and fees. Of this sum, Unit will receive approximately $500,000.00 in cash as partial payment of an $800,000.00 non-interest bearing obligation of B & B Properties to Unit. Approximately $100,000.00 will be paid to the limited partners of B & B Properties.

The purchaser of the real estate will assume the first mortgage on the premises. The balance of the purchase price, $675,000.00, will be evidenced by the purchasers' negotiable promissory note, secured by a subordinated vendor's lien, payable to the order of B & B Properties, bearing interest at the rate of ten percent per year.

A hearing was held on this application on June 19,

1980. From Debtor's application and this hearing, this Court has determined that the sale of the real estate in accordance with the terms of the Land Contract is fair and reasonable. The sale is in the best interest of Unit and its creditors as it will permit Unit to receive a substantial amount of cash which otherwise would not be available to it over the short term and will allow Unit to receive additional monies over the next months as payments on the promissory note fall due.

In addition, this Court has determined that this sale is in the best interest of B & B Properties, as it is so material to the rehabilitation of Unit, Inc. Therefore, absent the most extraordinary reasons, it would be unreasonable for any limited partner of B & B Properties to withhold consent for this sale.

Accordingly, it is

ORDERED that Debtor's application for authorization of the sale in accordance with the terms of the Land Contract, is sustained and because this sale is of such importance to Unit's rehabilitation, Unit is directed to proceed with the sale in accordance with the terms of the Land Contract.

It is

FURTHER ORDERED that, as this Court finds that the sale is fair, reasonable and material to the rehabilitation of Unit, Inc., and, as this Court finds that absent an extraordinary reason, it would be unreasonable for any limited partner of B & B Properties to withhold consent for this sale, any limited partner seeking to withhold consent is directed to notify Unit, Inc. and this Court of his decision to withhold consent prior to June 30, 1980. Absent any such notification, all limited partners of B & B Properties will be deemed to have consented to this sale.

IT IS SO ORDERED.

L C Gartner

Leonard C. Gartner
Bankruptcy Judge

EXHIBIT 6

1055 St. Paul Place,
Cincinnati, Ohio 45202
(513) 579-0313

RECEIVED
JUN [illegible] 1980

19th June, 1980

TO: LIMITED PARTNERS OF B & B PROPERTIES

Dear Sirs,

B & B Properties has entered into a contract for the sale of Patchen Place Apartments, the land upon which the apartment complex is located, and the furnishings, equipment, etc. utilized in connection with the operation of the complex. The purchaser is Patchen Investment Group, a Kentucky general partnership. The purchase price is $5,300,000. The terms and conditions of the sale are set forth in the Court Order, a copy of which is attached to this letter.

As Unit, Inc. is a debtor-in-possession in proceedings under Chapter 11 of the Bankruptcy Act, it was necessary to first secure the permission of the United States Bankruptcy Court, Southern District of Ohio, Western Division. Such approval has been sought and, on June 19, 1980 the Court's approval was secured. The Court has concluded that the contract of sale is a good one and directed Unit to proceed with its consummation.

The Court, like the purchaser, is aware that your approval is required before the closing may occur. However, the Court also recognized that consummation of the sale would be most important to Unit's creditors. Because it was unable to foresee any reasonable objection to the sale, the Court has directed that any Limited Partner who seeks to withhold consent notify the Court and Unit in writing prior to June 30, 1980, at the addresses set forth below.

Unit believes that this sale is clearly in the best interests of the partnership. Your cooperation and consent is, therefore, requested.

Sincerely,
UNIT, INC.

BWM

B.W. Morris

U.S. Bankruptcy Court,
Southern District of Ohio,
Western Division,
735 U.S. Post Office & Courthouse,
Cincinnati, Ohio 45202.
Attention: Hon. Leonard C. Gartner

Unit, Inc.,
1055 St. Paul Place,
Cincinnati, Ohio 45202.

EXHIBIT 7

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

IN THE MATTER OF:	:	No. B-1-75-1989
	:	
UNIT, INC.	:	IN PROCEEDINGS FOR
	:	AN ARRANGEMENT UNDER
Debtor.	:	CHAPTER XI

APPLICATION TO WITHDRAW

Unit, Inc. Debtor, by and through counsel, hereby seeks to withdraw Debtor's Application for Authorization of the Sale of the Assets of B & B Properties, filed June 9, 1980 and all tangential motions and proceedings arising thereunder. B & B Properties and certain limited partners of B & B Properties have been sued in Fayette County, Kentucky by the purchaser contemplated in Debtor's Application to Sell. The Kentucky action will involve the same issues that were raised by Debtor and the limited partners of B & B Properties in objection to the sale authorized herein.

Wherefore, Debtor seeks to withdraw from the record in this case its application for authority to sell the assets of B & B Properties and all tangential proceedings arising thereunder.

Sherman Unger

Sherman E. Unger
Trial Attorney for Unit, Inc.
2820 DuBois Tower
Cincinnati, Ohio 45202
Phone: (513) 241-0820

OF COUNSEL:

Michael G. Kohn
Patricia A. Kindel
2820 DuBois Tower
Cincinnati, Ohio 45202

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

IN THE MATTER OF:	:	No. B-1-75-1989
	:	
UNIT, INC.,	:	IN PROCEEDINGS FOR
	:	AN ARRANGEMENT UNDER
Debtor.	:	CHAPTER XI

MEMORANDUM OF LAW

On June 9, 1980, Debtor filed an application for authorization of the sale of the assets of B & B Properties, in accordance with the terms of the land contract entered into between B & B Properties and the Patchen Investment Group. On June 19, 1980, this Court entered an order authorizing the sale. After entry of this order, certain limited partners of B & B Properties raised objections to the sale. Debtor vigorously opposed the filing of these objections on the grounds that, pursuant to the terms of B & B Properties Limited Partnership Agreement, these limited partners lack standing to object to the proposed sale. A hearing was held on Debtor's motion to strike and various other motions have been filed by both Debtor and limited partners. On July 25, 1980, this Court reserved its ruling on the limited partners' standing and on the unreasonabliness of their objections until after an evidentiary hearing, presently set for October 20, 1980.

On August 5, 1980, the Patchen Investment Group brought an action in Fayette County, Kentucky against B & B Properties and the dissenting limited partners. A copy of the Complaint is attached hereto as Exhibit A. This action raises the issue of the standing of these limited partners under the terms of the B & B Partnership Agreement and the unreasonableness of their refusal to consent to the sale. Debtor, as general partner of B & B Properties, must defend this action in Kentucky.

B & B Properties is a Kentucky limited partnership and the property sought to be sold is located in Fayette County, Kentucky. Debtor's application for authority to sell contemplated a sale of the property to the Patchen Investment Group. The filing of this action in Kentucky changes the circumstance surrounding Debtor's application for sale in that the prospective purchaser may be no longer ready or willing to perform during pendency of the Kentucky action. Debtor, therefore, respectfully seeks to withdraw its application for authority to sell, and all motions and proceedings raised thereunder.

In making this application to withdraw, Debtor is not admitting the validity of the arguments raised by the limited partners that this Court may lack jurisdiction over the limited partners or the assets of B & B Properties. However, it is in the best interest of Debtor and its estate to have the issue of the interpretations of the B & B Limited Partnership Agreement conclusively resolved in the Kentucky Courts without requiring Debtor to unnecessarily litigate these same issue in this Court.

Withdrawal of Debtor's application would obviate ruling by this Court on the following motions:

1. Debtor's Motion to Strike the Objections by Limited Partners, filed July 3, 1980;

2. The Limited Partners Petition for Reconsideration, filed July 10, 1980;

3. The Limited Partners' Motion to Strike Debtor's Motion to Strike, filed July 14, 1980;

4. Debtor's Motion to Strike the Limited Partner's Motion, filed July 16, 1980;

5. Debtor's Motion to Strike The Limited Partners Petition for Reconsideration, filed July 30, 1980. Withdrawal would also obviate the necessity for depositions pursuant to the subpoenas duces tecum, issued by this Court on July 28, 1980.

Therefore, because of this change in circumstances set forth above and in order to avoid unnecessary litigation and duplication of effort by Debtor and this Court, it is respectfully requested that this Court grant Debtor's application to withdraw its application for authority to sell the assets of B & B Properties and all tangential motions and proceedings arising thereunder.

Sherman E. Unger
Trial Attorney for Unit, Inc.
2820 DuBois Tower
Cincinnati, Ohio 45202
Phone: (513) 241-0820

OF COUNSEL:

Michael G. Kohn
Patricia A. Kindel
2820 DuBois Tower
Cincinnati, Ohio 45202

CERTIFICATE OF SERVICE

I hereby certify that on this 11 day of August, 1980 a copy of the foregoing Application to Withdraw and Memorandum in Support was served upon Morris Berger, Esq. and Michael Hahalyak, Esq. by placing a copy of the same, postage prepaid, in the U. S. Mail, addressed to them at their respective addresses: Berger, Kapetan, Malakoff & Meyers, P.C. 508 Law and Finance Building, Pittsburgh, Pennsylvania 15219 and 2001 Clark Building, 717 Liberty Avenue, Pittsburgh, Pensylvania 15222.

Patricia A. Kindel

Exhibit "A"

FAYETTE CIRCUIT COURT
CIVIL BRANCH
3rd DIVISION

PATCHEN INVESTMENT GROUP 83-566 PLAINTIFF

V. COMPLAINT NO. 80CI-2421

B & B PROPERTIES, a Kentucky Partnership; JOSEPH M. BEHUN; DALVIN J. HODDER, MESSRS. BERGER & KAPETAN; HEATH LARRY; ROBERT C. PEARLMAN; ALLEN J. SAKS; MICHAEL HAHALYAK; FERNAND M. PARENT; EDWARD W. JEW, JR; S. DAVID LITMAN AND MRS. ROSLYN M. LITMAN; WILLIAM E. REISINGER AND MRS. ELIZABETH S. REISINGER; RALPH J. SIMONS; BERT J. JAMES; and ROBERT J. WISE DEFENDANTS

* * * * * * * * * *

The Plaintiff, Patchen Investment Group, (Patchen), by way of its complaint against the Defendant, B & B Properties, (B & B) and against the Defendants, Joseph M. Behun, Dalvin J. Hodder, Messrs. Berger & Kapetan, Heath Larry, Robert C. Pearlman, Allen J. Saks, Michael Hahalyak, Fernand M. Parent, Edward W. Jew, Jr., S. David Litman and Mrs. Roslyn M. Litman, William E. Reisinger and Mrs. Elizabeth S. Reisinger, Ralph J. Simons, Bert J. James and Robert J. Wise, (Dissenting Partners), states as follows:

Count 1

1. On or about May 8, 1980, Patchen and B & B entered into an agreement whereby B & B agreed to sell and Patchen agreed to purchase that certain apartment complex located in Lexington, Kentucky, on Patchen Drive known as the Patchen Place Apartments for the sum of $5,300,000.00.

2. Pursuant to the provisions of such purchase agreement, Patchen and B & B set a closing date at 10:00 a.m. on June 30, 1980 in Lexington, Kentucky.

3. At the time of closing, Patchen was ready, willing and able to fully perform its obligations under the purchase agreement and remains and has remained at all times ready, willing and able to perform such obligations.

4. In violation of the terms of the aforesaid agreement, B & B has refused to convey such property to Patchen, giving as a reason the refusal of the Dissenting Partners of B & B to approve the sale to Patchen.

5. In fact, B & B admits that the Dissenting Partners of B & B have no standing to object to such sale, since, by the express terms of the partnership agreement of B & B only those Dissenting Partners which remain liable for losses have any right to object to such sale and none of the Dissenting Partners are liable for losses.

6. In fact, B & B admits that even if any of the Dissenting Partners had the right to object to such sale, the refusal to consent to such sale is unreasonable and in violation of the B & B partnership agreement which expressly provides that a consent to the sale of partnership property by B & B shall not be unreasonably withheld by any limited partner.

Count 2

1. The Dissenting Partners have intentionally and improperly interfered with the sale of the Patchen Place Apartments to Patchen by contending that they have the right to withhold their consent to such sale when in fact they have no such standing and in fact any refusal by them to consent to such sale is unreasonable.

2. The purpose of the improper interference by the Dissenting Partners is not to benefit the partnership, but in fact is to permit certain of the Dissenting Partners to acquire the Patchen Place Apartments for their own account and to permit certain of the Dissenting Partners to avoid the payment of Federal Income Taxes.

3. As a result of the foregoing improper interference, the Plaintiff has been damaged in the sum of $1,000,000.00.

Count 3

The aforesaid claim of the Plaintiff against the Defendants, Dissenting Partners, arises out of their transacting business and having an interest in, using and possessing real property in this Commonwealth. Said Defendants are non-residents of the State of Kentucky and their last known addresses are as follows:

Mr. Joseph M. Behun
419 Maple Lane
Sewickley, Pa. 15143

Mr. Dalvin J. Hodder
4140 Brownsville Road, Suite 228
Pittsburgh, Pa. 15227

Messrs. Berger & Kapetan
508 Law & Finance Building
Pittsburgh, Pa. 15219

Mr. Heath Larry
U. S. Steel Building,
600 Grant Street
Pittsburgh, Pa. 15219

Mr. Robert C. Pearlman
813 S. Aiken Avenue
Pittsburgh, Pa. 15232

Mr. Allen J. Saks
2300 Marbury Road
Pittsburgh, Pa. 15221

Mr. Michael Hahalyak
2001 Clark Building
717 Liberty Avenue
Pittsburgh, Pa. 15222

Mr. Fernand M. Parent
426 W. Main Street
Monongahela, Pa. 15063

Mr. Edward W. Jew, Jr.
2048 Hycroft Drive
Pittsburgh, Pa. 15241

Mr. S. David Litman and
Mrs. Roslyn M. Litman
1701 Grant Building
Pittsburgh, Pa. 15219

Mr. William E. Reisinger
and Mrs. Elizabeth S.
Reisinger
88 Craven Drive
Charleroi, Pa. 15022

Mr. Ralph J. Simons
1479 Glenn Avenue
Glenshaw, Pa. 15116

Mr. Bert J. James
3520 Oublette Avenue
Windsor, Ontario, Canada
N9E 3M2

Mr. Robert J. Wise
Rt. #3, Box 3071
Berwick, Pa. 18603

WHEREFORE, Plaintiff demands judgment declaring that the Dissenting Partners have no standing to object to the aforesaid sale to Patchen and adjudicating that any refusal by the Dissenting Partners to consent to such sale is unreasonable; demands judgment of specific performance directing B & B Properties to convey the aforesaid property to Patchen; demands judgment against the Defendants, Joseph M. Behun, Dalvin J. Hodder, Messrs. Berger & Kapetan, Heath Larry, Robert C. Pearlman, Allen J. Saks, Michael Hahalyak, Fernand M. Parent, Edward W. Jew, Jr., S. David Litman and Mrs. Roslyn M. Litman, William E. Reisinger and Mrs. Elizabeth S. Reisinger, Ralph J. Simons, Bert J. James and Robert J. Wise, jointly and severally, in the amount of $1,000,000.00; demands its costs herein and all other relief to which it might appear entitled.

THOMAS H. BURNETT
259 West Short Street
Lexington, Kentucky 40507
Thomas H. Burnett
ATTORNEY FOR PLAINTIFF

A TRUE COPY
ATTEST: ROBERT M. TRUE, CLERK
FAYETTE CIRCUIT COURT
BY, ______ DEPUTY

BERGER KAPETAN MALAKOFF & MEYERS, P.C.
ATTORNEYS AT LAW
808 LAW AND FINANCE BUILDING
PITTSBURGH, PA 15219
AREA CODE 412
281-4200

MORRIS M. BERGER
DANIEL M. BERGER
E. WILLIAM BERGER
ALEC M. KAPETAN
MICHAEL P. MALAKOFF
JERRY L. MEYERS
LOUISE R. MALAKOFF
RICHARD A. FINBERG

July 7, 1980

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Unit, Inc.
Mr. B. W. Morris, President
1055 St. Paul Place
Cincinnati, OH 45202

Gentlemen:

You are hereby notified by the undersigned in behalf of Limited Partners of B&B Properties, a Limited Partnership, that you are removed as General Partner of said partnership, effective thirty (30) days from date of first receipt of this Notice.

The reasons for this demand are based upon various violations of the terms contained in the Amended Partnership Agreement between Unit, Inc., General Partner, and Robert J. Blum, Special Limited Partner, and the Limited Partners, parties to said Agreement and in violation of your fiduciary duties owed the Limited Partners under the law. Among the alleged violations are various acts of mismanagement, misapplication of funds, breach of fiduciary duty owed to the Limited Partners, acts in conflict of interest in entering into an unauthorized contract of sale of all of the assets of the partnership, the attempted unlawful diversion of the proceeds of the sale, etc.

You have already received notice that Limited Partners strenuously object to the proposed sale of the sole asset of the Limited Partnership, especially as outlined in the Order of Bankruptcy Court in the proceedings filed by you, which are in violation of the Partnership Agreement.

Any further acts in conflict with the duties towards the Limited Partners will be at your own peril. This includes all acts that may prove to be prejudicial to the interests of the partnership.

You are directed to transfer all the books and assets of the partnership to the newly elected General Partner Dean Bartlett, 1605 Clark Building, Pittsburgh, PA 15222.

Yours very truly,

Morris M. Berger
Morris M. Berger

Michael Mahalyak

MMB:MH/eol
Att.

(Copy by regular mail)

cc: Hon. Leonard C. Gartner
Sherman E. Unger, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of August, 1980, a copy of the foregoing Answer to Application to Withdraw and Memorandum In Support Of Answer To Application To Withdraw was served upon Honorable Leonard C. Gartner, Bankruptcy Judge, U.S. Bankruptcy Court, Southern Division of Ohio, Western Division, 735 U.S. Post Office and Courthouse, Cincinnati, Ohio 45202 and Sherman E. Unger, Esquire, 2820 DuBois Tower, Cincinnati, Ohio 45202 by placing a copy of the same, postage prepaid in the United States mail, addressed to them at the foregoing addresses.

Doreen A. Yurik

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION
In Proceedings For An Arrangement
Under Chapter IX
No. B-175-1989

IN THE MATTER OF:

UNIT, INC.

DEBTOR

ANSWER TO APPLICATION TO WITHDRAW
and MEMORANDUM IN SUPPORT OF
ANSWER TO APPLICATION TO WITHDRAW

BERGER KAPETAN MALAKOFF
& MEYERS, P. C.
ATTORNEYS AT LAW
909 LAW & FINANCE BUILDING
PITTSBURGH, PA. 15219
281-4200

EXHIBIT 9

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN THE MATTER OF:	:	
	:	No. B-1-75-1989
UNIT, INC.,	:	
	:	IN PROCEEDINGS FOR
Debtor	:	AN ARRANGEMENT UNDER
	:	CHAPTER XI

REPLY MEMORANDUM IN SUPPORT OF APPLICATION TO WITHDRAW

On August 11, 1980, Debtor filed an application to withdraw its application for authority to sell the assets of B & B Properties ("B & B"). Because the intended purchasers of the property have filed suit against B & B and certain of its limited partners in Kentucky, Debtor seeks to withdraw its application in the interest of judicial economy and in the best interest of Debtor's estate. As Debtor no longer has a ready purchaser for the property, it is unnecessary for this Court to proceed any further with Debtor's application to sell and the issues raised thereby.

Incredibly, the limited partners of B & B have filed a "answer" opposing Debtor's application to withdraw. The limited partners, in opposing the sale, contend that this Court lacks jurisdiction over "the subject matter and over the persons of the limited partners." Petition for Reconsideration and Vacation of Order at 2: See Memorandum of Law on Behalf of Limited Partners at 1. Now these same limited partners contend that Debtor's application to withdraw is intended "to circumvent the jurisdiction of this Court." Memo in Support of Answer at 3.

To support their opposition to the withdrawal, the limited partners allude to various purported claims against Debtor. Debtor respectfully submits that, if any of these purported claims are with merit, the limited partners may proceed with them in an appropriate manner. However, the limited partners have failed to establish any reason why this Court should proceed with Debtor's application to sell the property of B & B when Debtor no longer has a ready purchaser for that property.

For the reasons set forth above and in Debtor's application to withdraw, it is respectfully requested that this Court withdraw Debtor's application for authority to sell the assets of B & B Properties and all tangential motions and proceedings arising thereunder.

Sherman E. Unger/pak
Sherman E. Unger
Trial Attorney for Unit, Inc.
2820 DuBois Tower
Cincinnati, Ohio 45202
Phone: (513) 241-0820

OF COUNSEL:

Michael G. Kohn
Patricia A. Kindel
2820 DuBois Tower
Cincinnati, Ohio 45202

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of August, 1980 a copy of the foregoing Reply Memorandum in Support of Application to Withdraw was served upon Morris Berger, Esq. and Michael Hahalyak, Esq. by placing a copy of the same, postage prepaid, in the U. S. Mail, addressed to them at their respective addresses: Berger, Kapetan, Malakoff & Meyers, P.C. 508 Law and Finance Building, Pittsburgh, Pennsylvania 15219 and 2001 Clark Building, 717 Liberty Avenue, Pittsburgh, Pennsylvania 15222.

Patricia A. Kindel
Patricia A. Kindel

SUPPLEMENTAL STATEMENT
BY WAY OF REBUTTAL
BY MORRIS M. BERGER AND MICHAEL HAHALYAK

To the Honorable, the Chairman and Members of the Senate Judiciary Committee inquiring into the matter of the confirmation of the appointment of Sherman E. Unger, Esquire, as a Judge of the United States Court of Appeals.

We respectfully submit the following supplemental statement by way of Rebuttal of testimony given by the candidate:

1. We respectfully state that we were requested to submit such rebuttal due to the fact that we could not do so on account of the adjournment of the hearing on October 27, 1983.

2. We would like to correct certain statements made by Mr. Unger. Mr. Unger stated that the hearing on June 19, 1980, involved only the creditors and for that reason he did not given notice to the Limited Partners.

This statement is erroneous for several reasons:

(a) The property that Unit Inc. was attempting to sell was not the asset of Unit Inc., but the property of the Limited Partners of B & B Properties;

(b) Each of the Limited Partners was a creditor of Unit Inc. because Unit Inc. had guaranteed under the Partnership Agreement payment to the Limited partners aggregating $150,000.00, which had not been paid. The status of the partners as creditors is shown in the audit report filed by Unit's accountant. Although the Limited Partners were listed in the audit report as creditors of Unit Inc., Sherman Unger failed to include them in the statement of creditors in his bankruptcy statement.

Had Mr. Unger included the Limited Partners as creditors in his Petition for Arrangement in 1975, the Limited Partners would have had notice of the bankruptcy and because of the conflict of interest would have required his discharge. By not receiving this notice to which they were entitled as far back as 1975, the Limited Partners were not aware of the bankruptcy under Chapter 11 until approximately 4½ years later. This was the first notice of the bankruptcy proceeding received by the Limited Partners.

3. Mr. Unger states that the Partnership Agreement allows the assets of B & B to be sold as long as 50% of the Limited Partners consent, which consent cannot be arbitrarily withheld. This is entirely false. There is nothing to support this position other than his argument. Under the Partnership Agreement, the 50% consent applies only to continuing management affairs, i.e., sales in excess of $100,000 and not to the entire sale and termination of the business. This clause also applies only to sales within partnership purposes.

4. The candidate, Sherman Unger, Esquire, during the hearing of October 27, 1983, stated that his Application to the Bankruptcy Court on behalf of the General Partner resulting in the Order of Court dated June 19, 1980, permitting the sale of B & B Properties' holdings for the purpose of raising funds to pay off the bankrupt General Partner's debts, was proper. As a bankruptcy lawyer with many years of expertise in that field, Mr. Unger knew or should have known that a Bankruptcy Court has no jurisdiction to order the sale of the entire assets of a viable, successful partnership enterprise, merely because an owner of a fractional interest in said partnership is in bankruptcy and that only the bankrupt's assets, which includes its fractional interest, is within the jurisdiction of the Bankruptcy Court.

5. Mr. Unger, as a lawyer of expertise in bankruptcy matters, should have known that the Order allowing Limited Partners to register their refusal to consent within five days of the receipt of a copy of the Order of June 19, 1983, giving adequate reasons for refusal, was not equiva-

lent to the requirement of the Land Contract requiring approval without the necessity of giving "reasons that had to be reasonable." He should also have known that the Order mandating that failure to register refusal or refusal without adequate reasons would be deemed to give consent and would be equivalent to the taking of their property without due process of law, and confiscatory.

6. We refute Mr. Unger's statements that he had conformed with the law in obtaining the Order of Court to sell B & B Properties, the sole asset of the partnership, as a whole to satisfy the debts of his client, Unit Inc., for the following reasons:

a. The Bankruptcy Court had no jurisdiction whatsoever over the property of the Limited Partnership, B & B Properties, which was not in bankruptcy, and merely because the General Partner was in bankruptcy and since it had to sell its 12½% interest in the partnership which it owned as a Limited Partner did not confer jurisdiction in the Bankruptcy Court.

b. The candidate should have followed the procedure of §362.490(2) of the Uniform Limited Partnership Act of the Commonwealth of Kentucky which states:

> "362.490 Rights, powers and liabilities of the General Partner. A General Partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without Limited Partners, except that WITHOUT THE WRITTEN CONSENT OR RATIFICATION OF THE SPECIFIC ACT BY ALL THE LIMITED PARTNERS, A GENERAL PARTNER OR ALL OF THE GENERAL PARTNERS HAVE NO AUTHORITY TO DO ANY ACT WHICH WOULD MAKE IT IMPOSSIBLE TO CARRY ON THE ORDINARY BUSINESS OF THE PARTNERSHIP."

c. The candidate should have advised his client, Unit Inc., that it must obtain the written consent of all the Limited Partners of B & B Properties to this specific act, namely, the sale of Patchen Place, and that, having obtained such consent, he would present an Application to the Bankruptcy Court to approve the sale of Unit's 12½%

interest in the partnership over which the Bankruptcy Court did have jurisdiction as an asset of the bankrupt.

d. We respectfully submit, that by proceeding in the manner in which he did, the candidate attempted to circumvent the law and its procedure and has involved the Limited Partners of B & B Properties in an endless and ongoing scenario of suits and counter-suits, to their detriment and financial losses, all of which were avoidable if the candidate had acted according to law.

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF ALLEGHENY)

BEFORE ME, the undersigned authority, personally appeared the undersigned affiants, who, being duly sworn according to law, depose and say that the averments in the the attached statement are true and correct according to their knowledge, information and belief.

Morris M. Berger
MORRIS M. BERGER (SEAL)

MICHAEL HAMALYAK (SEAL)

SWORN to and subscribed
before me this 21th day
of October, 1983.

Janet L. Christensen
NOTARY PUBLIC

JANET L. CHRISTENSEN, NOTARY PUBLIC
PITTSBURGH, ALLEGHENY COUNTY
MY COMMISSION EXPIRES MAY 23, 1985
Member, Pennsylvania Association of Notaries

IN RE: APPOINTMENT OF SHERMAN UNGER, ESQ.

In the year of 1971, B. W. Morris, a client of Sherman Unger, Esquire, both of Cincinnati, Ohio, retained a promotion company of Pittsburgh, Pa., to obtain investors for the purpose of funding the construction of an apartment complex to be built in Lexington, Kentucky, on land owned by Morris or his solely owned Texas corporation, known as "Unit Inc." and by a co-owner named Blum.

The promoters obtained a number of business and professional people in Pittsburgh who invested, collectively, a total of $564,000.00 for which they were to receive Limited Partnership shares at the rate of $23,500.00 per share in the Limited Partnership.

The Partnership Agreement provided that it would be subject to the laws of Kentucky and the Certification of Partnership was signed by the parties.

The holdings were as follows: Unit Inc., General Partner and Limited Partner as well, with ownership of 12½%; Blum "Special Limited Partner" with 12½% share in the partnership; all other Limited Partners, including Berger & Kapetan and Michael Hahalyak, 75% of the Limited Partnership. (Berger & Kapetan and Michael Hahalyak together own 9.375% of the shares at a cost of $70,500.00.)

The partnership was named "B & B Properties, a Limited Partnership." The subscriptions were paid in simultaneously with the conveyance of the land to B & B Properties. Unit Inc. was designated as the General Partner and manager of the partnership business. B. W. Morris, of course, as the sole stockholder and officer of his corporation, Unit Inc., took control of the affairs of the limited partnership and thereafter managed its operation. The complex consisted of 238 units which became known as "Patchen Place."

The Partnership Agreement and the Certification of Partnership provided that the partnership should continue for 50 years, until 2021 A.D., "unless sooner terminated by the partners."

The purpose of the partnership was stated as the operation of the apartment complex by rental of units, and the General Partner was empowered to manage and operate Patchen Place, and the operation was for the promotion of the purposes of the partnership. A mortgage was obtained from F.H.A. on the basis of a low-income housing project and all the partners covenanted with each other and with F.H.A. that the project and its financing was for the purpose of retaining it for investment and not for resale.

The Patchen Place apartments were completed on or about 1972 and B. W. Morris took control of its management. From the very beginning, the operation was successful in every way. The rentals were sufficient to pay mortgage interest and principal, taxes, insurance, maintenance, staff of employees, improvements, and even management fees and expenses which Morris and Unit Inc. took out of the operation, even though this was prohibited by the Partnership Agreement.

In 1975, Unit Inc. filed for an Arrangement under Chapter XI of the Bankruptcy Code in the Bankruptcy Court of the United States District Court of the Southern District of Ohio. The cause of this bankruptcy had absolutely nothing to do with the operation of B & B Properties' Patchen Place Apartment Complex. The cause was the involvement of Unit Inc. in other enterprises of Unit and its subsidiaries. Between 1975 when Unit applied to Bankruptcy Court and was appointed debtor-in-possession, until June, 1980, Unit Inc., through B. W. Morris, operated as manager of Patchen Place without notifying the Limited Partners of it being in bankruptcy and continued to take money from the rentals, although the Limited Partners have not yet received one dollar from the operation.

Prior to June, 1980, Mr. Unger had been negotiating in behalf of Unit Inc. for the sale of Patchen Place with a Lexington, Kentucky, group known as "Patchen Investment Group" to said Group. These negotiations were without the knowledge or participation of the Limited Partners who had invested the cash necessary to create the venture. These negotiations were consummated by Mr. Unger for Unit Inc. in a "Land Contract" (also without Limited Partners' knowledge) between Unit and the Patchen Group dated May 12, 1980.

The Land Contract provided for the sale of Patchen Place, the B & B Properties' entire asset which would upon sale, of course, put the partnership out of business. Their property would be sold and they would have to take what they were offered. This property was worth many times what their original investment was due to appreciation.

The Land Contract did provide (page 7) as follows:

> "16. APPROVAL REQUIRED. Purchaser recognizes that Unit, Inc., general partner of Seller, is a Debtor-in-Possession in a proceeding for a Chapter XI arrangement in the United States Bankruptcy Court for the Southern District of Ohio, and that this contract is conditioned upon securing the approval of the United States Bankruptcy Court for the Southern District of Ohio and the limited partners of Seller to all the terms and conditions hereof." [Emphasis added]

However, the ex parte order of June 19, 1980, obtained from Judge Gartner by Mr. Unger, after reciting that the order was to be entered on the Debtor's Application and at this hearing (which was also ex parte) the Court determined that the sale of the real estate "is in the best interest of Unit and its creditors..." and

> "In addition, this Court has determined that this sale is in the best interest of B & B Properties, as it is so material to the rehabilitation of Unit Inc. Therefore, absent the most extraordinary reasons, it would be unreasonable for any Limited Partners of B & B Properties to withhold consent for this sale."

The Court also stated as follows:

> "It is FURTHER ORDERED that, as this Court finds that the sale is fair, reasonable and material to the rehabilitation of Unit Inc., and, as this Court finds that absent an extraordinary reason, it would be unreasonable for any Limited Partner of B & B Properties to withhold consent for this sale, any partner seeking to withhold consent is directed to notify Unit Inc. and this Court of his decision to withhold consent prior to June 30, 1980. Absent such notification, all Limited Partners of B & B Properties will be deemed to have consented to this sale. IT IS SO ORDERED. L. C. Gartner, Bankruptcy Judge."

We do not know how Judge Gartner could have made the determination that he did on an ex parte basis, especially to determine that "it was in the best interest of B & B Properties" without any representation at the hearing in behalf of B & B. We question where or from whom the Court got this information or prepared this Order.

Furthermore, to state that it was for the best interests of the Limited Partners to lose their valuable, successful investment in order to pull the General Partner's "chestnuts out of the fire" is preposterous. We doubt that Judge Gartner could have included such a statement if he had prepared this Order.

This order was made or allowed to be made by Mr. Unger in spite of the provision in the Land Contract in which he participated requiring the APPROVAL of the Limited Partners to validate the sale, but, instead, the Order provided that the Limited Partners would have to OBJECT to the sale by June 30, 1980, giving sufficient reasons for their objections; otherwise, they would be deemed to have consented. This improperly shifted the burden on the Limited Partners to object with reasons instead of Unit Inc.'s obtaining consents which did not need to be conditioned in any way.

To add insult to injury, by the time copies of the June 19, 1980, Order reached any of the Limited Partners, who lived in Pennsylvania and even other part of the country, it was June 23, 1980, or later, and they had to assemble to decide what they would have to do. There was a meeting and Berger & Kapetan and Michael Hahalyak, who were Limited Partners and also attorneys were chosen to appear in Court and object. This was very much under pressure and over a weekend and on the morning of June 30, 1980, they appeared in Judge Gartner's courtroom and protested. Mr. Unger and an attorney, Thomas Burnett, of Lexington, Kentucky, who represented the proposed purchaser, appeared against us and insisted that the Court finalize the sale. Judge Gartner decided against finalization and ordered us to present briefs, which we did.

In behalf of the Limited Partners we protested strenuously that the General Partner had no authority whatsoever to sell out the Partnership asset for its own purposes or needs and objected to the ex parte proceedings.

Our position is, and always has been, that a "General Partner has no authority under the Uniform Limited Partnership Act of Kentucky (and most other states), without the written approval of the specific act by all the Limited Partners, to do any act which would make it impossible to continue the business of the partnership [ULPA of Ky. §362.490(2)]"; and that the General Partner can sell nothing belonging to the Partnership unless it was for a partnership purpose.

We do not want, of course, to argue the whole case in this statement, but we feel certain that Mr. Unger, who is very learned in the law, knows this law as well as we do.

After many pleadings and memoranda of law filed by both sides, on August 11, 1980, Mr. Unger, on behalf of Unit Inc., filed another ex parte Application without prior notice to the Limited Partners or their counsel. This Application was to request the Court to allow Mr. Unger to withdraw the Application for Authority to Sell the Assets of B & B Properties, on the basis of which Judge Gartner had previously entered his Order of June 19, 1980. Following the filing of said Application to Withdraw, Mr. Unger appeared, again ex parte, in Judge Gartner's courtroom (or chamber) and requested an Order from him to withdraw. Judge Gartner was reluctant to do so without communicating with us, which he did by calling Mr. Berger on the telephone and asking whether we of counsel had any reason not to have Mr. Unger withdraw his Application. We were willing to do so if the Court made said withdrawal "with prejudice" which Mr. Unger refused. The reason assigned by Mr. Unger for his Application to Withdraw was that the intended purchaser, "Patchen Investment Group," had filed suit in the Fayette Circuit Court of Kentucky for specific performance.

Judge Gartner subsequently refused the ex parte Application, and in lieu thereof, suspended the proceedings in his Court to wait until he heard from the Kentucky Court on the action brought by Patchen Investment Group.

That case has been going on and on, and although a decision was rendered in favor of the Limited Partners in the Kentucky case, the plaintiff, Patchen Investment Group, requested the Court to reconsider this opinion and have now attempted to file amendments.

Mr. Michael G. Kohn, formerly an associate of or counsel of Mr. Unger, is participating in that pending action, as well as in further involvements in the Bankruptcy Court in Cincinnati.

While awaiting a decision from the Fayette Circuit Court of Kentucky, Mr. Kohn and Mr. Burnett entered into a new agreement between Unit Inc. as General Partner and Patchen Investment Group, as a result of which B. W. Morris as chairman of Unit Inc., debtor-in-possession in bankruptcy, executed a deed purporting to pass title to Patchen Place to Patchen Investment Group. These negotiations and sales agreements and the execution of the deed were withheld from the plaintiffs as Limited Partners and as counsel. To remove this deed from record, we, as Limited Partners, have filed suit in the U.S. District Court for the Eastern District of Kentucky. This suit is now pending.

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF ALLEGHENY)

BEFORE ME, the undersigned authority, personally appeared MORRIS M. BERGER, ESQUIRE, and MICHAEL HAHALYAK, ESQUIRE, who, being duly sworn according to law, depose and say that the statements set forth in the attached Supplemental Statement By Way of Rebuttal are true and correct according to their information, knowledge and belief.

Morris M. Berger
MORRIS M. BERGER

MICHAEL HAHALYAK

SWORN to and subscribed
before me this 28th day
of October, 1983.

Janet L. Christensen
NOTARY PUBLIC

JANET L. CHRISTENSEN, NOTARY PUBLIC
PITTSBURGH, ALLEGHENY COUNTY
MY COMMISSION EXPIRES MAY 23, 1985
Member, Pennsylvania Association of Notaries

VINCENT T. LOMBARDI CANCER RESEARCH CENTER
GEORGETOWN UNIVERSITY SCHOOL OF MEDICINE

DIVISION OF MEDICAL ONCOLOGY
PHILIP S. SCHEIN MD, CHIEF
PAUL V. WOOLLEY, MD
FREDERICK P. SMITH, MD
JOHN R. NEEFE, MD
PATRICK J. BYRNE, MD
JAMES D. AHLGREN, MD

KENNETH D. TEW, PhD
ABDULAH RAHMAN, PhD
ABRAHAM GOLDIN, PhD

3800 RESERVOIR ROAD, N.W.
WASHINGTON, D.C. 20007
(202) 625-7081

5 June 1983

To whom it may concern:

RE: Sherman Unger

Mr. Sherman Unger is a patient that I am currently treating for diffuse histiocytic lymphoma. He has stage IVB lymphoma which is a cancer of the lymph node system and is a cancer which is very responsive to chemotherapy. He has undergone his first cycle of BACOP chemotherapy and has had a very dramatic response to the initial dose. There is a very good chance that this patient will undergo a complete remission and be able to maintain a prolonged period of complete remission. In our experience there is a 60% chance of complete remission lasting indefinitely. During the chemotherapy which will be administered as an outpatient over the next 6-12 months the patient should be able to maintaine a full work load and have no adverse side effects which would hinder his ability to perform in any capacity. Should you have any questions regarding his condition or his therapy please do not hesitate to contact me here at Georgetown University Hospital.

Sincerely,

Jim Harvey, MD
Fellow
Medical Oncology

VINCENT T. LOMBARDI CANCER RESEARCH CENTER
GEORGETOWN UNIVERSITY SCHOOL OF MEDICINE

DIVISION OF MEDICAL ONCOLOGY
PHILIP S. SCHEIN MD, CHIEF
PAUL V. WOOLLEY, MD
FREDERICK P. SMITH, MD
JOHN [illegible], MD
PATRICK J. BYRNE, MD
JAMES D. AHLGREN, MD

GEORGETOWN UNIVERSITY HOSPITAL
3800 RESERVOIR ROAD, N.W.
WASHINGTON, D.C. 20007
(202) 625-7061

7 June 1983

To Whom It May Concern:

Re: Sherman E. Unger

Mr. Sherman Unger is patient who I am currently treating for diffuse histiocytic lymphoma, which is a cancer of the lymph node system and a cancer which is very responsive to chemotherapy. Mr. Unger has undergone his first cycle of BACOP chemotherapy and had a very dramatic positive response to the initial dose. Based upon my observations, there is a very good chance that this patient will undergo a complete remission.

During the chemotherapy, which will be administered as an outpatient over the next 6-12 months, Mr. Unger should be able to maintain a full workload and have no adverse side effects which would hinder his ability to perform in any capacity.

Should you have any questions regarding his condition or his therapy, please do not hesitate to contact me here at Georgetown University Hospital.

Sincerely,

Jim Harvey, M.D.
Fellow
Medical Oncology

VINCENT T. LOMBARDI CANCER RESEARCH CENTER
GEORGETOWN UNIVERSITY SCHOOL OF MEDICINE

DIVISION OF MEDICAL ONCOLOGY
PHILIP S. SCHEIN MD, CHIEF
PAUL V. WOOLLEY, MD
FREDERICK P. SMITH, MD
JOHN S. [illegible], MD
PATRICK J. BYRNE, MD
JAMES E. AHLGREN, MD

GEORGETOWN UNIVERSITY HOSPITAL
3800 RESERVOIR ROAD, N.W.
WASHINGTON, D.C. 20007
(202) [illegible]

7705

27 June 1983

To Whom It May Concern:

Re: Sherman E. Unger

Mr. Sherman Unger is a patient who I am currently treating for diffuse histiocytic lymphoma, which is a cancer of the lymph node system. This is a curable disease which is very responsive to chemotherapy. Mr. Unger has undergone several cycles of BACOP chemotherapy and had a very dramatic positive response. Based upon my observations, this patient has obtained a complete remission.

During the chemotherapy, which will be administered as an outpatient over the next several months, Mr. Unger will be able to maintain a full workload with no adverse side effects which would hinder his ability to perform fully in any capacity.

Should you have any questions regarding his condition or his therapy, please do not hesitate to contact me here at Georgetown University Hospital.

Sincerely,

J Harvey

Jim Harvey, M.D.
Fellow
Medical Oncology

Diamond May '83

THE ATTENDING PHYSICIAN
CONGRESS OF THE UNITED STATES

FREEMAN H. CARY, M.D.
FACP, FACC, FACCP

September 27, 1983

The Honorable Strom Thurmond
Chairman, Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

I've had an opportunity to review the records that were presented to me concerning Mr. Sherman E. Unger. According to these documents Mr. Unger is presently in remission from his disease. According to his physician and the latest information available in the literature, there is a sixty percent chance that his remission may be permanent.

If you or your staff have any further questions concerning this patient, I'd be happy to discuss it with them directly.

Yours sincerely,

FREEMAN H. CARY, M.D.

FHC:rfi

GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

August 16, 1983

Mr. Robert J. Short
Chief Investigator
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Duke,

Enclosed is a copy of the medical release form which we discussed last week and which has been delivered to Dr. Harvey at the Vincent Lombardi Cancer Research Center. As you can see, the hospital has been authorized to make all records available to you or your designee.

If I can be of further assistance, please do not hesitate to contact me. Kindest regards,

Very sincerely,

Sherman E. Unger

Enclosure

cc: Jonathan C. Rose, Esq.

VINCENT T. LOMBARDI CANCER RESEARCH CENTER
GEORGETOWN UNIVERSITY SCHOOL OF MEDICINE

DIVISION OF MEDICAL ONCOLOGY
PHILIP S. SCHEIN MD, CHIEF
PAUL V. WOOLLEY, MD
FREDERICK P. SMITH, MD
JOHN R. NEEFE, MD
PATRICK J. BYRNE, MD
JAMES D. AHLGREN, MD

GEORGETOWN UNIVERSITY HOSPITAL
3800 RESERVOIR ROAD, N.W.
WASHINGTON, D.C. 20007
(202) 625-7081

August 15, 1983

To Whom It May Concern:

In re: Sherman E. Unger

Please make available all records pertaining to the above named individual to Mr. Robert J. Short, Chief Investigator, Committee on the Judiciary, United States Senate, Washington, D.C. 20510, or his designee.

Sherman E. Unger
Signature

August 15, 1983
Date

Jimmy Harvey, M.D.
Division of Medical Oncology
202/625-7705

DEPARTMENT OF HEALTH & HUMAN SERVICES Public Health Service

National Institutes of Health
Bethesda, Maryland 20205

October 6, 1983

Senator Strom Thurmond
Chairman, Senate Judiciary Committee
United States Senate

Dear Senator Thurmond:

Although the records I have reviewed on Mr. Sherman Unger are not complete, there is sufficient material to ascertain that he was found to have advanced stage (stage IV B) diffuse large cell lymphoma in June, 1983. This cancer, which originates in lymphocytes, apparently involved lymph nodes in the patient's chest and abdomen, the liver and spleen, and involved one of the patient's testes. He was thoroughly evaluated and treated with a 5-drug combination chemotherapy regimen called BACOP. He had received 4 cycles of therapy as of 8/18/83 and appeared to be responding well to the treatment. This regimen (BACOP) is now one of the standard treatment programs for diffuse aggressive lymphomas. It was developed here at the Medicine Branch of the National Cancer Institute about 10 years ago and results in the first 25 patients treated with it were reported in the Annals of Internal Medicine, volume 85, pages 417 through 422, 1976. About half of all patients treated with BACOP achieve complete remission and over 80% of patients achieving a complete remission appear to be cured of their disease. Thus, if Mr. Unger achieves a complete remission, he has a very high likelihood of being cured of his lymphoma. Virtually all patients who will relapse from a complete remission do so within 2 years of stopping therapy. Many patients receiving BACOP continue to work however, its side effects can be quite severe acutely. After treatment is stopped, most patients return to normal levels of activity.

The approach to Mr. Unger's treatment has been excellent and appears very similar to the type of management we use in patients with his disease. Please let me know if you have specific questions that I have not addressed.

Sincerely yours,

Dan L. Longo

Dan L. Longo, M.D.
Senior Investigator
Head, Experimental Immunology Section
Medicine Branch
National Cancer Institute

DLL:lp

Medical Center

50 Irving Street, NW.
Washington D.C. 20422

Veterans Administration

In Reply Refer To: 688/00

September 23, 1983

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Thurmond:

Per your request I have had the Chief of Medicine and Chief of Hematology review the medical records of Mr. Sherman E. Unger. It is their opinion that the prognostic statement given by Dr. Harvey is valid. Almost 60% of patients have prolonged remissions and physicians are beginning to talk of "cures".

Mr. Unger has responded well and while complications can arise, there is no reason to anticipate that he will be too debilitated. He appears to be a lucky guy.

I trust this is satisfactory.

With kindest personal regards,

Cavazzi

A. A. CAVAZZI
Medical Center Director

VINCENT T. LOMBARDI CANCER RESEARCH CENTER
GEORGETOWN UNIVERSITY SCHOOL OF MEDICINE

DIVISION OF MEDICAL ONCOLOGY
PHILIP S. SCHEIN MD, CHIEF
PAUL V. WOOLLEY, MD
FREDERICK P. SMITH, MD
JOHN R. NEEFE, MD
PATRICK J. BYRNE, MD
JAMES D. AHLGREN, MD

GEORGETOWN UNIVERSITY HOSPITAL
3800 RESERVOIR ROAD, N.W.
WASHINGTON, D.C. 20007
(202) 625-7081

September 28, 1983

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Re: Sherman E. Unger

Mr. Sherman Unger is a patient for whom I am currently concluding treatment for diffuse histiocytic lymphoma, which is a cancer of the lymph node system. This is a curable disease which is very responsive to chemotherapy. Mr. Unger has undergone several cycles of BACOP chemotherapy and had a very dramatic positive response. Based upon my observations, this patient obtained a complete remission after his first cycle.

During the chemotherapy, which will be concluded as an outpatient during the next several weeks, Mr. Unger will be able to maintain a full workload with no adverse side effects which would hinder his ability to perform fully in any capacity.

Mr. Unger's overall general health is normal and he has no medical condition which would limit his ability to perform his duties as a Federal Judge.

Should you have any questions regarding his condition or his therapy, please do not hesitate to contact me here at Georgetown University Hospital.

Sincerely,

J— Harvey M

Jim Harvey, M.D.
Fellow
Medical Oncology

UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
Address: COMMISSIONER OF PATENTS AND TRADEMARKS
Washington, D.C. 20231

JAN 2 6 1983

Sherman E. Unger, Esq.
General Counsel
Department of Commerce
Washington, DC 20230

Dear Sherm:

I am pleased to endorse wholeheartedly your nomination as a judge on the newly established Court of Appeals for the Federal Circuit.

As you know, while the law establishing that Court was pending in the Congress, I strongly supported its enactment. I firmly believe that over the next several years a single appellate court for patent cases nationwide will develop a definition of patentability which will be understandable to patent attorneys and business executives alike.

I agree with most of the spokesmen of the patent bar that the new Court should contain an appropriate mix of judges with background and experience in patent law. On the other hand, the Court is not a single-purpose court; it has far-reaching jurisdiction over many critically important areas including Federal procurement, trade issues and general Federal administrative matters such as personnel controversies.

Given your experience as General Counsel of HUD and most recently as the General Counsel of the Department of Commerce, I believe you are uniquely qualified for appointment to the Court. I have very much enjoyed working with you these past two years, and I appreciate your strong support for our efforts to strengthen the systems of law to protect inventions and other forms of intellectual property.

If there is anything I can do to assist during the nomination process, please let me know.

Sincerely,

Gerald J. Mossinghoff
Commissioner of Patents and Trademarks

ARTHUR ANDERSEN & CO.

425 WALNUT STREET
CINCINNATI, OHIO 45202
(513) 381-6900

September 8, 1983

Mr. Sherman E. Unger
General Counsel
Room 5870
Department of Commerce
14th & Constitution
Washington, D.C. 20230

Dear Mr. Unger:

Enclosed is a schedule summarizing your taxable income, taxes and credits for the years 1977 through 1982. Please note that these figures are after adjustment for Revenue Agent Revues and IRS adjustments.

If you have any questions, please call.

Very truly yours,

ARTHUR ANDERSEN & CO.

By
D. Eugene Ewing

Enclosure
mad

SHERMAN E. & NANCY M. UNGER
SUMMARY OF TAXABLE INCOME & TAX LIABILITY
1977 - 1982

Year	Taxable Income	Tax Liability	Minimum Tax	ITC Recapture	SE Tax	Credits	Total Tax
1977	$145,486	$65,469	$7,031	$496	$1,304	($6,722)	$67,578
1978	113,420	48,962	5,469	760	462	(5,876)	49,777
1979	138,773	65,310	2,511	654	1,855	(5,177)	65,153
1980	294,205	152,851	None	93	2,098	(2,181)	152,861
1981	205,727	109,540	24,916	410	2,583	(9,625)	127,824
1982 (estimated)	278,810	126,854	5,278	4,000	3,029	(1,000)	138,161
Totals	$1,176,421	$568,986	$45,205	$6,413	$11,331	($30,581)	$601,354
Average	$196,070	$94,831	$7,534	$1,069	$1,889	($5,097)	$100,226

Jun 19 '80
[illegible] JUDGES
OHIO

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN THE MATTER OF: : No. B-1-75-1989
:
UNIT, INC., : IN PROCEEDINGS FOR
: AN ARRANGEMENT
Debtor. : UNDER CHAPTER XI

ORDER AUTHORIZING THE SALE OF THE ASSETS OF B & B PROPERTIES

At Cincinnati, in said District, on this 19th day of June, 1980:

On June 9, 1980, Unit, Inc., Debtor-in-Possession, filed a motion pursuant to Rule 11-54(b) of the Rules of Bankruptcy Procedure, for authorization of the sale of certain real property owned by B & B Properties, a limited partnership of which Unit, Inc. is the general partner. According to the terms of the Land Contract, the purchase price for this real estate is $5,300,000.00. B & B Properties will receive the sum of $1,000,000.00 cash upon closing, less closing costs and fees. Of this sum, Unit will receive approximately $500,000.00 in cash as partial payment of an $800,000.00 non-interest bearing obligation of B & B Properties to Unit. Approximately $100,000.00 will be paid to the limited partners of B & B Properties.

The purchaser of the real estate will assume the first mortgage on the premises. The balance of the purchase price, $675,000.00, will be evidenced by the purchasers' negotiable promissory note, secured by a subordinated vendor's lien, payable to the order of B & B Properties, bearing interest at the rate of ten percent per year.

A hearing was held on this application on June 19, 1980. From Debtor's application and this hearing, this Court has determined that the sale of the real estate in accordance with the terms of the Land Contract is fair and reasonable. The sale is in the best interest of Unit and its creditors as it will permit Unit to receive a substantial amount of cash which otherwise would not be available to it over the short term and will allow Unit to receive additional monies over the next months as payments on the promissory note fall due.

In addition, this Court has determined that this sale is in the best interest of B & B Properties, as it is so material to the rehabilitation of Unit, Inc. Therefore, absent the most extraordinary reasons, it would be unreasonable for any limited partner of B & B Properties to withhold consent for this sale.

Accordingly, it is

ORDERED that Debtor's application for authorization of the sale in accordance with the terms of the Land Contract, is sustained and because this sale is of such importance to Unit's rehabilitation, Unit is directed to proceed with the sale in accordance with the terms of the Land Contract.

It is

FURTHER ORDERED that, as this Court finds that the sale is fair, reasonable and material to the rehabilitation of Unit, Inc., and, as this Court finds that absent an extraordinary reason, it would be unreasonable for any limited partner of B & B Properties to withhold consent for this sale, any limited partner seeking to withhold consent is directed to notify Unit, Inc. and this Court of his decision to withhold consent prior to June 30, 1980. Absent any such notification, all limited partners of B & B Properties will be deemed to have consented to this sale.

IT IS SO ORDERED.

L C Gartner

Leonard C. Gartner
Bankruptcy Judge

NIEMAN, AUG, ELDER & JACOBS
ATTORNEYS AND COUNSELORS AT LAW
1000 ATLAS BANK BUILDING
524 WALNUT STREET
CINCINNATI, OHIO 45202-3177
(513) 621-8280

WILLIAM H. NIEMAN
J. VINCENT AUG
JAMES L. ELDER
MAURICE W. JACOBS
LOUIS F. LAUSCHE
JOHN D. MCCLURE
HENRY E. MENNINGER, JR.

September 9, 1983

Honorable Strom Thurmond
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am an attorney at law practicing in Cincinnati, Ohio. I am admitted to practice before the Courts of Ohio, the United States District for the Southern District of Ohio, the United States Court of Appeals for the Sixth Circuit and the Supreme Court of the United States. I am a life member of the Judicial Conference of the Sixth Circuit and for several years, have been an adjunct professor of law at the University of Cincinnati, College of Law, teaching Debtor-Creditor law.

I am writing this letter in support of the nomination of Sherman E. Unger as a United States Circuit Judge for the Federal Circuit. I have been advised that a question has arisen regarding two affidavits executed by Mr. Unger, which affidavits were filed with the United States Bankruptcy Court for the Southern District of Ohio, Western Division. One affidavit was filed in the matter of Unit, Inc., proceedings under Chapter XI of the Bankruptcy Act, pending as Case No. B-1-75-1989. The other was filed in the matter of Scioto Park, Ltd., proceedings under Chapter XII of the Bankruptcy Act, then pending as Case No. B-1-75-2321.

Mr. Unger and I were engaged as co-counsel in both of those proceedings. I was engaged specifically because of my extensive experience in bankruptcy law and my number of years of practice before the Bankruptcy Court in Cincinnati. I prepared each of the affidavits in question.

The language contained in each "I am not related not [sic] do I have any relationship to the Debtor . . ." was used by me to connote a lack of blood relationship between Mr. Unger and the principals of the Debtor entities. Unit, Inc. was a corporation and Scioto Park, Ltd. was a limited partnership.

At that time, Mr. Unger held no stock interest in Unit, Inc., nor was he serving as an officer, director, or employee of that corporation. However, Mr. Unger did hold a limited partnership interest in Scioto Park, Ltd.

It is my recollection that Mr. Unger's interest in Scioto Park, Ltd. as a limited partner was disclosed to the

Creditors and to the Court in the Schedules and Statement of Affairs in that proceeding. The failure to reference this interest in the affidavit which I prepared and Mr. Unger signed was not intended in any way to deceive either the Court or the Creditors. Parenthetically, I note that a limited partnership interest is an investment only. Limited partners have no right to control the operation of the partnership, or the partnership's business. In that respect, a limited partnership interest is analagous to the ownership of stock in a corporation. It is my recollection that Mr. Unger's interest was minimal -- approximating 2%.

In those affidavits, Mr. Unger also stated "nor do I have any interest adverse to the Debtor's estate." With respect to Scioto Park, it was, and is, my opinion that the interest of a limited partner and that of a general partner is not adverse but the same, for the viability of the partnership is the goal of a Chapter XII proceeding and the rehabilitation contemplated by Chapter XII inures to the benefit of both general partners and limited partners alike.

Mr. Unger's interest in Scioto Park was the subject of discussion before the Court. The late Bankruptcy Judge of that Court, the Honorable Leonard Gartner, was fully aware of Mr. Unger's interest, but felt that the best interest of the proceeding were served by Mr. Unger serving as counsel for the Debtor in that case. In view of the disclosures which Mr. Unger made to the Court and to the Creditors regarding his minor interest in Scioto Park, Ltd., I can state with assurance that the omission of a recital of such interest in the affidavit which I prepared did not carry even the slightest implication of intent on the part of Mr. Unger to improperly influence the proceeding. I can further state that the Court was in agreement with that view and that no party or creditor in that proceeding was prejudiced.

In conclusion, Senator, I have known Sherman Unger for a long time and have worked with him professionally in the past. I consider him to be a person of high integrity and would have no hesitation in relying upon his word in any future dealing between us. I believe that Mr. Unger would be a valuable asset to the judiciary of the United States and strongly support his nomination. Moreover, I am anxious to appear before your Committee to testify on Mr. Unger's behalf and accordingly request arrangements be made for my testimony.

I hope this letter has cleared up any questions you or your staff may have had with respect to the affidavits in question. If not, please do not hesitate to contact me with respect to any further particulars.

Very truly yours

J. Vincent Aug

J. Vincent Aug

Standard Form 52—Rev. July 1968
U.S. Civil Service Commission
FPM Ch. 295

REQU[illegible]T FOR PERSONNEL ACTION

10[illegible]27-70

PART I. REQUESTING OFFICE: Unless otherwise instructed, fill in all items in this part *except those inside the heavy lines.* If applicable, obtain resignation and separation data on reverse side.

1. NAME (CAPS) LAST—FIRST—MIDDLE MR.—MISS—MRS. UNGER, SHERMAN MR.	2. *(For agency use)*	3. BIRTH DATE *(Mo., Day, Year)* 10-09-27	4. SOCIAL SECURITY NO. 286-20-7911
A. KIND OF ACTION REQUESTED: (1) PERSONNEL *(Specify appointment, reassignment, resignation, etc.)* Requested Resignation		B. REQUEST NUMBER	C. DATE OF REQUEST 10-13-70
(2) POSITION *(Specify establish, review, abolish, etc.)*		D. PROPOSED EFFECTIVE DATE 10-13-70	E. POSITION SENSITIVITY

5. VETERAN PREFERENCE 1—NO 2—5 PT. 3—10 PT. DISAB. 4—10 PT. COMP. 5—10 PT. OTHER 2	6. TENURE GROUP 1	7. SERVICE COMP. DATE 02-01-69	8. HANDICAP CODE
9. FEGLI 1—COVERED (REGULAR ONLY—DECLINED OPTIONAL) 2—INELIGIBLE 3—WAIVED 4—COVERED (REG. & OPT.) 1	10. RETIREMENT 1—CS 2—FICA 3—FS 4—NONE 5—OTHER 1		11. *(For CSC use)*
12. NATURE OF ACTION CODE 517 Resignation	13. EFFECTIVE DATE *(Mo., Day, Year)* 10-13-70	14. CIVIL SERVICE OR OTHER LEGAL AUTHORITY Presidential Appointee	

15. FROM: POSITION TITLE AND NUMBER 51034-0 General Counsel	16. PAY PLAN AND OCCUPATION CODE EX 0000	17. (a) GRADE OR LEVEL 4	(b) STEP OR RATE	18. SALARY $38,000.00
19. NAME AND LOCATION OF EMPLOYING OFFICE HUD General Counsel, Immediate Office of the General Counsel Washington, D. C.				

20. TO: POSITION TITLE AND NUMBER	21. PAY PLAN AND OCCUPATION CODE	22. (a) GRADE OR LEVEL	(b) STEP OR RATE	23. SALARY
24. NAME AND LOCATION OF EMPLOYING OFFICE				

25. DUTY STATION *(City—county—State)* Washington, D. C.		26. LOCATION CODE
27. APPROPRIATION 02000 0 2000	28. POSITION OCCUPIED 1—COMPETITIVE SERVICE 2—EXCEPTED SERVICE 2	29. APPORTIONED POSITION FROM: ☐ 1—PROVEN-1 2—WAIVED-2 TO: ☐ STATE

F. REMARKS BY REQUESTING OFFICE *(Continue in item F on reverse side, if necessary)*

G. REQUESTED BY *(Signature and title)* *(Leave blank on resignations)*

H. FOR ADDITIONAL INFORMATION—CALL *(Name and telephone number)*

I. REQUEST APPROVED BY:
SIGNATURE
TITLE: Under Secretary

PART II. TO BE COMPLETED BY PERSONNEL OFFICE (Items inside heavy lines in Part I above also to be completed)

J. POSITION CLASSIFICATION ACTION ☐ IDENTICAL ADDITIONAL ☐ NEW ☐ VICE ☐ REGRADED

K. CLEARANCES	Initials or Signature	Date
(1)		
(2) CEIL. OR POS. CONTROL		
(3) CLASSIFICATION		
(4) PLACEMENT OR EMPL.		
(5)		
(6) APPROVED BY:	Crandall	

(7) REMARKS: *(Note: Use item 30 on reverse for Standard Form 50 remarks)*

QUALIFICATION STANDARD:

10/26/70

THE WHITE HOUSE
WASHINGTON

October 13, 1970

Dear Sherm:

Your participation as a member of my Administration has been a source of pride and gratification to all of us who are dedicated to the cause of good government. The knowledge that the legal aspects of the complex mission of the Department of Housing and Urban Development were in your capable hands has been very satisfying to me. It is with special reluctance, therefore, that I am relieving you of your responsibilities as General Counsel of HUD, effective as of this date, in order that your successor can be confirmed. All of your fellow citizens have reason to be deeply thankful for the exceptional service you have given to our country, and I want to take this opportunity to wish you all the best in the years ahead.

Sincerely,

Honorable Sherman Unger
General Counsel
Department of Housing
  and Urban Development
Washington, D. C.

EIGHTEENTH FLOOR
FIRST NATIONAL BANK CENTER
CINCINNATI, OHIO 45202

[illegible] SEP 2[illegible] PM 4:23

September 22, 1983

The Honorable Strom Thurmond
Chairman
Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Thurmond:

It is now expected that next Thursday, September 29, a hearing will take place before your Committee on the confirmation of Sherman E. Unger, formerly of this city, to serve as Judge on the Federal Court of Appeals in Washington. I have been asked to address this letter to you by Ms. Brooksley E. Born, Chairperson of the American Bar Association's Standing Committee on Federal Judiciary. As you must know, that Committee has unanimously voted, after a long and careful investigation of Mr. Unger's suitability to serve as a Federal Judge, that he is not qualified for that position. Since the position to which Mr. Unger has been nominated is one of high judicial importance, demanding utmost integrity and ability in the discharge of its responsibilities, it is readily apparent that I should comply with Ms. Born's request. The fair, just and intelligent resolution of cases submitted to that court in which he is called on to participate is directly involved. The nomination of a man to be a Federal Judge is not a matter to be treated casually by anyone, particularly by the President of the United States. Although I am a strong Republican and have supported President Reagan in much that he is trying to do, I am convinced that he was poorly advised and badly misled in making this nomination.

In my relations with Mr. Unger a number of years ago, I found him to be untrustworthy, devious and manipulative, as well as unscrupulous when in a position not to be called to account. This behavior was exemplified by ceaseless obstruction in a most unprofessional way of the examination of a witness by authorized deposition in another state shortly before trial when no relief was realistically feasible. It was also exemplified by ex parte conversations with the Trial Judge when the latter was in another state during a recess in the trial of a case--without notice to opposing counsel--to obtain an order permitting a deposition then to be taken in California for use when the trial of the case resumed. Oral statements by him could in no way be relied on when it suited his changing position to ignore them or even to deny that they were said. These experiences occurred during the trial and preparation of the case of W. R. Grace & Co. v. Hargadine, et al. in the Federal District Court here in April and May, 1966. Others in this office have had similar experiences with him. This unfortunate behavior finds support in his reputation here for trustworthiness and for truth and veracity. That reputation, with which I am acquainted, is not good.

Since those days, more important occurrences have taken place, in which this firm has been directly or peripherally involved. These occurrences serve to confirm in a most convincing way that Sherman Unger is not qualified to occupy the high position he now seeks. One of these occurrences involved a Chapter XII proceeding in the Bankruptcy Court in Wilmington (Freidco of Wilmington, Delaware, Ltd.) and a Chapter XI proceeding in the Bankruptcy Court here in Cincinnati (Unit, Inc.) in which this firm represented a creditor. Mr. Unger represented the debtor in both instances. The Delaware proceeding was appealed to the Federal District Court in Wilmington and then to the Third Circuit. It became apparent through close questioning of Mr. Unger and through testimony of the Bankruptcy Judge in Cincinnati, who appeared and testified in the Wilmington proceeding, that Mr. Unger had successfully sought ex parte relief from the Cincinnati Bankruptcy Judge in the Chapter XI proceeding, which had a direct bearing on the Chapter XII proceeding in Delaware and could have resulted in the Wilmington proceeding's being placed under the control of the Cincinnati Bankruptcy Court. No notice was given to any other counsel involved in either of these proceedings. The District Court in Wilmington so found on appeal from the Bankruptcy Court there, and issued an injunction prohibiting Mr. Unger's clients from interfering in the Cincinnati Bankruptcy Court with the Wilmington proceeding. When questioned about his ex parte actions in Cincinnati by the Third Circuit on a further appeal, Mr. Unger's "defense" was that the practice in Ohio was different from the practice in Delaware or Pennsylvania in the matter of ex parte conferences seeking court action, particularly Bankruptcy Court action, and also that he was conferring with the Bankruptcy Judge on purely an "administrative" matter. The Third Circuit put to rest the second part of his defense and, in looking askance at what Mr. Unger had done, viewed the matter as purely judicial. See transcript of oral argument before Third Circuit, August 7, 1978, pp 34-37. That being the case, as is made perfectly clear from a reading of the record, it may also be said, contrary to Mr. Unger's assertion, that the practice in Ohio is no different from the practice elsewhere. In all situations except that of utter emergency (and even then notice promptly follows) notice of a prospective conference with a court is always given to interested counsel in the most effective way available. It is suspected that Mr. Unger was well aware of this at the time but chose to ignore it in the belief that he would never be challenged, in order to strengthen his position in the Delaware proceeding. The Third Circuit responded to Mr. Unger's appeal by affirming the District Court on the same day of the oral argument--August 7, 1978. In re Freidco of Wilmington, Del., 582 F.2d 1274.

The second occurrence coming to my attention which involved unusual behavior came to the surface in 1978 during the course of a stockholders' derivative action entitled Donohoo, et al. v. American Financial Corporation, et al. (No. C-1-76-277 in the Federal District Court here). Two years after the case was filed in 1976, plaintiffs sought to change counsel by substituting Mr. Unger for their record counsel. Mr. Unger filed his application for substitution. Various objections and affidavits were filed, including affidavits of Gary P. Kreider and Charles Berghaussen attached to a Supplemental Memorandum of Defendant American Financial Corporation, et al. in opposition to Mr. Unger's application. Copies of such affidavits are attached hereto. This firm represented certain individual defendants and took an active part in the case, including strong opposition to his application to be substituted as plaintiffs' trial attorney. The threats of

Mr. Unger upon learning of his dismissal in 1972 as Vice-President of American Financial Corporation ("AFC"), as set forth in the affidavits, caused disruption at the headquarters of the company, and some, including Carl H. Lindner (one of the defendants whom we represented), left the building quickly. Mr. Unger barricaded the door to his office and it was some time before the door could be forced open.

There were extensive filings on the application of Mr. Unger in the Donohoo case against his former employer. The application was denied in a careful and lengthy opinion by the District Judge, Timothy S. Hogan, which was affirmed in the Court of Appeals when Mr. Unger, not the plaintiffs, took an appeal on his own behalf. The relevant point here is the complete disregard by Mr. Unger of the effect of his prior employment by AFC and his disdain of the appearance of propriety and discreet professional conduct when faced with the opportunity to intrude into an important case against his former employer, which was also likely to entail a large fee.

Mr. Unger's intellectual equipment has the potential to serve him well. However, intelligence without integrity is dangerous. Therein lies the rub here. Those not having an adversary relationship with him may be excused for not seeing this side of the nominee; his clothing is dropped in an adversary struggle, whereas in a social or joint venture association he is more apt at keeping it in place. This marked deficiency in integrity and frequent disregard of even the appearance of propriety, when seeking an end by almost any means and accompanied by only slight risk of being called to account, flash danger signals that cannot be ignored. He should not be nominated to be a Federal Judge, where these unfortunate traits would be most likely to flower.

If it is suitable for your purposes, this letter with its enclosures may be made a matter of public record.

Sincerely,

Robert T. Keeler

Robert T. Keeler

bjh
Enclosures
cc Ms. Brooksley E. Born

RICHARD C. VAN DUSEN

September 26, 1983

Mr. Robert Short
Chief Investigator
United States Senate Judiciary Committee
SD-224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Short:

In accordance with our telephone conversation of last week, I enclose a written statement which I hope may be of assistance to the Committee on the Judiciary as it considers the nomination of Sherman Unger to be a judge of the United States Court of Appeals for the Federal Circuit.

I regret that the hearing date as finally selected presents schedule conflicts which prevent my appearing in person. If you or members of the Committee require further information, please don't hesitate to call.

Your associate, Mr. Kopka, asked that I contact George Romney to inquire whether he might submit a similar statement. Mr. Romney has been out of the city since late last week and I have thus far been unable to reach him. I will continue to try and hope that I may be successful in time to be useful to you.

Sincerely,

Richard C Van Dusen

Richard C. Van Dusen

RCV/cd
Enclosure

cc: Lewis H. Van Dusen, Jr., Esquire
William T. Coleman, Jr., Esquire

UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

In the Matter of the Nomination of
Sherman Unger to be Judge,
United States Court of Appeals for the Federal Circuit.

Statement of Richard C. Van Dusen

My name is Richard C. Van Dusen. I am an attorney. Since 1949, I have been a member of the State Bar of Michigan, and I have been admitted to practice in the United States District Court for the Eastern District of Michigan, the United States Court of Appeals for the Sixth Circuit, and the United States Supreme Court. I am a partner in the Detroit, Michigan law firm of Dickinson, Wright, Moon, Van Dusen & Freeman, with which I have been associated, except for two interruptions for state and federal government service, since 1949.

From 1969 through 1972, I served as the Under Secretary of the United States Department of Housing and Urban Development. From early 1969 until about October of 1970, Sherman Unger was the General Counsel of the Department of Housing and Urban Development. He was appointed by and served at the pleasure of the President. Within the Department, he reported to the Secretary, George Romney, and to me.

I understand that Mr. Unger's appointment as a Judge of the United States Court of Appeals for the Federal Circuit is before the United States Senate Committee on the Judiciary. Some months ago, when Mr. Unger's appointment was first submitted to the Senate, I was contacted by the cognizant committee of the American Bar Association and asked if I had information relevant to Mr. Unger's qualifications for this judicial post. I provided certain information which I regarded as relevant, and responded affirmatively when asked whether I would be willing to testify before the Senate when it considered the nomination. Because of scheduling problems and conflicts, it now appears that I will be unable to appear in person. At the suggestion of the staff of the Senate Committee on the Judiciary, I respectfully submit this written statement.

What follows is based on my recollection, refreshed as best I can, of events which took place over twelve years ago. I cannot, therefore, guaranty precise accuracy. Subject to those qualifications, I believe the discussion which follows to be essentially correct.

As I have indicated above, Mr. Unger and I both served in the Department of Housing and Urban Development from early 1969 until his departure in the Fall of 1970. I found him to be intelligent and energetic. I also found him to be very ambitious. By early 1970, I became concerned about the impact of his ambition on his judgment and conduct as a senior official of the Department. I cannot, at this point, recall specific examples other than the one described below. But, as a general proposition, it appeared to me that Mr. Unger had "his own agenda," which was not necessarily consistent with the policies and objectives of the Department as established by the Secretary.

The example of Mr. Unger's conduct which I do recall, and which ultimately led Secretary Romney and myself to request that Mr. Unger resign as General Counsel of HUD, related to the transition of the Federal National Mortgage Association ("FNMA") from government entity status to private corporate status, pursuant to the Housing and Urban Development Act of 1968. The statute gave the Secretary of HUD considerable authority, during the transition period, to select the Board of Directors of FNMA, but eventually a majority of the Board was to be elected by the shareholders, with a minority to be designated by the President of the United States. As the transition period drew to a close in early 1970, a group of private citizens had been selected as directors to be elected by the shareholders. Mr. Unger was to be a Presidential appointee on the board.

Mr. Unger advised the then President of FNMA, Oakley Hunter, that Mr. Unger wished to be designated Chairman of the Board of FNMA. Mr. Hunter, however, concluded that in the interest of establishing FNMA's stature in the financial community as a private corporation, it would be desirable that the Chairman of the Board of FNMA be a distinguished private citizen, and Mr. Hunter obtained the commitment of former

General Lucius Clay, a FNMA director to be elected by its shareholders, to serve in that capacity. Secretary Romney concurred in the selection of General Clay as Chairman.

After he learned of General Clay's selection for the position to which he had himself aspired, Mr. Unger gave his legal opinion that General Clay had a conflict of interest which would preclude his service. This was a source of considerable embarrassment. As I recall it, it was necessary to request and obtain from the Office of Legal Counsel in the Department of Justice, an opinion that there was no disqualifying conflict.

Mr. Unger's actions, in which, in my opinion, his own self interest led him to act in a manner contrary to the expressed positions of the Secretary, caused the Secretary and myself to conclude that he could no longer serve effectively as General Counsel of HUD. With the concurrence of the White House, we requested his resignation.

Mr. Unger at first agreed to resign, but asked that he be permitted to remain in office until his successor was nominated. The selection of a new General Counsel took, as I recall it, two or three months, during much of which period Mr. Unger absented himself from the Department. When his successor was chosen by President Nixon, in September or October of 1970, and the nomination of the new General Counsel was sent to the Senate, Mr. Unger was reminded of his agreement to resign and was asked to submit his formal resignation. He declined to do so.

Because the Senate was unwilling to approve the appointment of a new General Counsel while a question existed regarding the existence of a vacancy, it then became necessary to obtain a letter from President Nixon terminating Mr. Unger's service as General Counsel. The assistance of the White House was requested by the Department, and through the intervention of Peter Flanigan, Assistant to the President, the President wrote to Mr. Unger a letter relieving him of his responsibilities as General Counsel of HUD. I believe this action was taken in October of 1970.

I have had no contact of any consequence with Mr. Unger since he left the Department of Housing and Urban Development. I recall one chance meeting in Washington several years ago as being the only contact at all. It is possible that with the passage of time he has developed in maturity and judgment.

However, on the basis of my experience with Mr. Unger in 1969 and 1970, in my opinion he did not then possess qualities of judgment and temperament appropriate and necessary in a Federal Judge. I hope this statement may be of assistance to the Committee in the execution of its important responsibility.

UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

In the Matter of the Nomination of
Sherman Unger to be Judge,
United States Court of Appeals for the Federal Circuit.

Statement of George Romney

My name is George Romney. I reside in Bloomfield Hills, Michigan. From early 1969 until early 1973, I was the Secretary of the United States Department of Housing and Urban Development.

I have read the attached statement of Richard C. Van Dusen submitted in connection with the consideration by the Committee on the Judiciary of the United States Senate of the appointment of Sherman Unger to be a judge of the United States Court of Appeals for the Federal Circuit.

I am familiar with the facts relating to Mr. Unger's service as General Counsel of the Department of Housing and Urban Development recited in Mr. Van Dusen's statement. In particular I am familiar with the events relating to the Chairmanship of Federal National Mortgage Association and the events surrounding the termination of Mr. Unger's service as General Counsel of HUD.

To the best of my recollection, the facts recited in Mr. Van Dusen's statement are correct.

George Romney
George Romney

September 26, 1983

Rec'd 9/27/83 1pm

U.S. Department of Justice
Office of the Deputy Attorney General

The Deputy Attorney General
Washington, D.C. 20530

September 27, 1983

The Honorable Strom Thurmond
Chairman, Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The purpose of this letter is to reaffirm the Department of Justice's support for the nomination of Sherman E. Unger to be a member of the Court of Appeals for the Federal Circuit. We are aware of the opposition of the Standing Committee on Federal Judiciary of the American Bar Association to the nomination of Mr. Unger and do not take it lightly. However, we have carefully reviewed the allegations contained in the letter of William T. Coleman to the Committee and have not found any evidence in support of those allegations sufficient to constitute a bar to Mr. Unger's confirmation. Indeed, we reviewed at length each of the allegations with representatives from the ABA.

Sherman Unger has served most ably and effectively in this Administration as general counsel of the Commerce Department. This distinguished public service weighed far more heavily with the Department of Justice than the largely anonymous allegations arising principally from highly controverted bankruptcy litigation which took place nearly a decade ago.

We urge the Senate Judiciary Committee to approve Sherman Unger's nomination. With warm regards.

Sincerely,

Edward C. Schmults
Deputy Attorney General

cc: Hon. Joseph R. Biden, Jr.

RECEIVED
OFFICE OF THE
GENERAL COUNSEL

JUL 21 4 14 PM '83

KOHN & HELMER
ATTORNEYS AT LAW
2820 DUBOIS TOWER
511 WALNUT STREET
CINCINNATI, OHIO 45202
TELEPHONE (513) 241-0820
TELECOPIER (513) 241-0838

MICHAEL G. KOHN*
JAMES B. HELMER, JR.**
PATRICIA A. KINDEL**
ANN LUGBILL

*ALSO D.C., FLA., N.J. BARS
**ALSO D.C. BAR

WASHINGTON OFFICE
888 SIXTEENTH STREET, N.W.
WASHINGTON, D.C. 20006
TELEPHONE (202) 833-8087

REPLY TO Cincinnati, Ohio

July 19, 1983

Sherman E. Unger
General Counsel
U.S. Department of Commerce
Room 5870
Washington, D.C. 20230

Dear Sherman:

You have asked me to check into a statement which appears on page 8 of the opening brief of Unit, Inc. and Freidco of Wilmington, Delaware, Ltd. to the United States Court of Appeals for the Third Circuit in Case No. 77-2426.

I have reviewed the statement:

> "Counsel for Unit requested an administrative conference with Judge Gartner to ascertain the effect of Freidco's trustee on the progress of the Unit proceeding."

That statement is cited to page 18 of the transcript of a hearing before Judge Stapleton in the United States District Court for the District of Delaware on July 21, 1977. The statement cited differs from the statement in the brief that "counsel for Unit" requested the administrative conference. To the contrary, the transcript reflects that you advised Judge Stapleton:

> "And some place along there, Judge Gartner called me in on the Administrative Conference and said: What's going on? What's happening in Wilmington?"

As I recall, this brief was written during the weekend following my return from the Ohio Bar examination. I recall concentrating on the "administrative conference" aspect of the statement, rather than who initiated the administrative conference. The statement in the brief should have been: "Counsel for Unit was requested to appear at an administrative conference . . . ." (Emphasis supplied). I regret the error for which I take full responsibility.

A copy of page 8 of the brief and page 18 of the transcript are enclosed for your reference.

Sincerely,

Mike

Michael G. Kohn

MGK/mju

Enclosures

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE:

FREIDCO OF WILMINGTON,
DELAWARE, LTD.,
a Limited Partnership,

Debtor,

UNIT, INC., and FREIDCO OF
WILMINGTON, DELAWARE, LTD.,

Appellants,

v.

ROBERT E. HICKMAN, HARRY B.
TINGLE, and FARMERS BANK
OF THE STATE OF DELAWARE,

Appellee.

No. 77-2426

Appeal from the United
States District Court
for the District of
Delaware
In Bankruptcy

BRIEF OF APPELLANTS

Andrew G. T. Moore, II
Connolly, Bove & Lodge
Farmers Bank Building
Wilmington, Delaware 19899

Sherman E. Unger
2724 DuBois Tower
Cincinnati, Ohio 45202

Attorneys for Appellants

trial and/or rehearing.

Since the filing of the Main & Akard petition, several other limited partnerships in which Unit was the general partner had filed petitions for arrangement in the Southern District of Ohio. All of these proceedings, as well as Unit's, were assigned to Judge Gartner. (T [8/25] 53)* In the course of one of these proceedings a copy of Judge Balick's decision appointing a trustee was given to Judge Gartner by counsel for a creditor. (T [8/25] 10; T [7/21] 17-18) Copies of unsigned briefs filed by Appellees in support of their application for a trustee were also provided Judge Gartner by the same counsel. (T [7/21] 17; T [8/25] 33)

Counsel for Unit requested an administrative conference with Judge Gartner to ascertain the effect of Freidco's trustee on the progress of the Unit proceeding. (T [7/21] 18) In addition to being the general partner, Unit, as of February 1, 1977, had taken on the responsibility for managing the building on behalf of the partnership for which it received a fee. (T [8/25] 48-49) Prior to that date, the building was managed by

---

*The number contained in brackets refers to the date of the hearing from which the transcript was prepared.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

In The Matter Of)
FREIDCO OF WILMINGTON,)
DELAWARE, LTD., a limited) BK No. 76-49
partnership,)
)
Debtor.)

- - - - -

July 21, 1977
Wilmington, Delaware

BEFORE:

THE HONORABLE WALTER K. STAPLETON, Judge,
United States District Court.

APPEARANCES

MORRIS, NICHOLS, ARSHT & TUNNELL
Paul P. Welsh, Esquire,
Attorney for Robert E. Hickman and
Harry B. Tingle,

RICHARDS, LAYTON & FINGER
Max S. Bell, Esquire,
Daniel Klein, Esquire,
Attorneys for Farmers Bank

and

MURDOCK & WALSH
Peter Walsh, Esquire,
Trustee

and

Judge Balick's Opinion was there almost before I got it the same way. There are a number of these pleadings that have been going in. This one is dated July 12th. And someplace along there, Judge Gartner called me in on the Administrative Conference and said: What's going on? What's happening in Wilmington?

He was interested for 2 reasons. One, Unit, Inc. owns 71 percent of that building. Two, since February 1st, Unit, Inc. has finally gotten to the point where they can manage the building and get management fees and it's going into that corporation.

And I said: Judge, Judge Balick surprised me but she had issued an Order for a Trustee. And I am working right now on a motion to reconsider, I am very optimistic about it. Since Unit, Inc. has been managing the building some 5 months, they have increased the cash flow by over a hundred percent. That's really impressive.

And he said: What are all these briefs?

And I said: Well, they were filed a year or so ago, I have no idea how they arrived on our desks or who got them or where they came from.

And he said: If we take away that management fee, it's that much harder for Unit.

LAW OFFICES
WEXLER, WEISMAN, FORMAN & SHAPIRO, P.C.
A PROFESSIONAL CORPORATION
1800 NORTH AMERICAN BUILDING
121 SOUTH BROAD STREET
PHILADELPHIA, PA. 19107
(215) 735-4800

LEON S. FORMAN
RAYMOND L. SHAPIRO
HOWARD T. GLASSMAN
HORACE A. STERN
CHARLES M. WEISMAN
HARVEY I. FORMAN
EDWARD I. SWICHAR*
THOMAS E. BIRON
HENRY M. KULLER
EARL T. STAMM
JOEL W. TODD
DIANE J. SIGMUND
LYNN G. ZEITLIN
ROBETTA B. PACKER
DAVID L. BRAVERMAN**
BARRY KRENGEL
FAITH R. GREENFIELD
RICHARD S. ROISMAN
BONNIE GLANTZ FATELL

MORRIS M. WEXLER
OF COUNSEL

MORRIS WEISMAN
[illegible]
JOHN E. MULDER
[illegible]
H. E. MAURER
[illegible]

TELECOPIER
(215) 735-6935

*ALSO DISTRICT OF COLUMBIA BAR
**ALSO CALIFORNIA BAR

Federal Express

September 27, 1983

Robert Short, Esquire
Chief Investigator
Senate Judiciary Committee
Dirksen Office Building
Washington, D.C. 20510

Dear Mr. Short:

In accordance with our conversation, I am enclosing herewith Affidavit in support of Statement and Position of the American Bar Association Standing Committee on the Federal Judiciary opposing the nomination of Sherman E. Unger as a Federal Circuit Judge.

I am sorry that this Affidavit is being furnished this close to the hearing date but I had expected to be present at the hearing originally scheduled for Wednesday, September 28th. When I was advised it had been moved to Thursday, September 29th, I realized I would not be able to attend as I am participating in a teaching assignment as part of an educational program sponsored by the Practicing Law Institute in New York that day and the next. In lieu of my testimony, I prepared the enclosed affidavit as quickly as possible and hope that it will be helpful to the Committee.

Sincerely yours,

LEON S. FORMAN

fc/mm
Enclosure

cc: Via Federal Express with enclosure
The Honorable Arlen Spector
Ms. Brooksley Born

To: The Committee on the Judiciary
United States Senate
....

The following affidavit is submitted by Leon S. Forman, Esquire, of Philadelphia in support of the Statement and Position of the Standing Committee on the Federal Judiciary of the American Bar Association in opposition to the nomination of Sherman E. Unger as United States Circuit Judge for the United States Court of Appeals for the Federal Circuit:

Commonwealth of Pennsylvania:
: ss.
County of Philadelphia :

Leon S. Forman, being duly sworn according to law, deposes and says:

I am an attorney at law, admitted to the practice of law in the Commonwealth of Pennsylvania, and before the United States District Court in the Eastern District of Pennsylvania, and the Third Circuit Court of Appeals, as well as the Supreme Court of the United States. I am presently the most senior member of the law firm of Wexler, Weisman, Forman & Shapiro, P.C. I have been engaged in the practice of law more than 40 years and have specialized in the fields of creditors' rights, bankruptcy, reorganizations and commercial law.

I was called by Pittsburgh counsel, Berkman, Ruslander, Pohl, Lieber & Engel, representing the Pittsburgh National Bank, a very substantial secured creditor, in a pending Chapter XII reorganization proceeding, Scioto Park, Ltd., in the United States Bankruptcy Court in Cincinnati, Ohio, to become associated with them and local counsel and to assist them in the further conduct of the case. Sherman Unger was co-counsel for the debtor, Scioto Park, Ltd. and was virtually in complete charge of its legal affairs as far as I could determine during the time I was involved. My engagement commenced in the summer of 1977 and continued until the claim of the Bank was settled, approximately 3 years later and the reorganization proceeding was about to be brought to a conclusion.

During my involvement there was extensive, complicated and heated litigation between the Bank and Scioto Park before the Honorable Leonard Gartner, Bankruptcy Judge, in which both Mr. Unger and I participated with other attorneys. I understand that Judge Gartner is now deceased. Mr. Unger and I were almost continually opposed to each other during this proceeding until the matter concerning the Bank was eventually settled through negotiation.

During the many times we had contact in court, I found him frequently to be intemperate and sometimes abusive. There were a number of occasions when it was obvious that he was having private conversations with the court. This was evident when he was seen leaving the Judge's chambers just prior to the time set for hearings in the case, or from remarks made by the Court during the hearings.

Counsel for the Bank discovered during the course of the case that Mr. Unger was accepting counsel fees from the debtor while the proceeding was pending without prior application to, and approval by the Bankruptcy Court, after notice to creditors. Such payments were in violation of the Rules of Bankruptcy Procedure promulgated by the Supreme Court and the Bankruptcy Act. These incidents have been documented by the ABA Committee.

Counsel for the Bank also discovered during the course of the case that Mr. Unger had failed to disclose in his affidavit filed with the court in connection with his request for approval of his employment as counsel for the debtor-in-possession as required by the Bankruptcy Rules and the Bankruptcy Act, that he had a close relationship with the debtor (other than as an attorney) as he was one of the debtor's limited partners, the debtor being a limited partnership. In fact, his affidavit denied, in effect, he had such relationship. The ABA Committee has copies of the relevant documents.

Whenever Mr. Unger did not have his way in the litigation, he was intemperate in his dealings with other counsel. On a number of occasions he filed papers with the Bankruptcy Court requesting action by the Court without timely service of copies on opposing counsel or sufficient notice to enable such counsel to appear or to file timely answers.

I agree with the conclusion of the ABA Committee respecting his nomination as a Federal Circuit Judge and support their position in opposition.

Leon S. Forman

Leon S. Forman

Sworn To and Subscribed
this 27th day of September, 1983

Dolores E. Sullivan

Notary Public

DOLORES E. SULLIVAN
Notary Public, Phila., Phila. Co.
My Commission Expires Sept. 26, 1986

October 12, 1983

Mr. Joseph Morris
General Counsel
Office of Personnel Management
1900 E Street, NW
Washington, DC 20415

Dear Mr. Morris:

The Committee on the Judiciary is currently considering the nomination of Sherman E. Unger to be a United States Circuit Judge for the Federal Circuit.

In connection with this nomination, I am attempting to locate a letter referenced in the attached correspondence as one from Mr. Unger dated June 9, 1970, to the United States Civil Service Commission, General Counsel's Office, making inquiry as to a possible conflict of interest that could relate to some members of the Board of Directors of the Federal National Mortgage Association (FNMA).

If a copy of the June 9, 1970, letter is available, or if you have further inquiries concerning this request, please contact the Chief Investigator for the Senate Judiciary Committee, Mr. Duke Short, at 224-8248.

Your assistance in this matter is appreciated.

With kindest regards and best wishes,

Sincerely,

Strom Thurmond
Chairman

ST:jtn

United States of America
Office of Personnel Management

Office of the General Counsel
Washington, D.C. 20415

In Reply Refer To:

Your Reference:

OCT 19

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Thurmond:

This responds to your letter of October 12, 1983, in which you requested a copy of a letter for the Committee on the Judiciary to use in connection with its consideration of the nomination of the Honorable Sherman E. Unger to be a United States Circuit Judge for the Federal Circuit. The letter in question, one dated June 9, 1970, from Mr. Unger, then General Counsel of the Department of Housing and Urban Development, to Mr. Karl Ruediger, Assistant General Counsel of the United States Civil Service Commission, is enclosed.

Please let us know if we may be of additional assistance in this matter.

Sincerely yours,

Joseph A Morris

Joseph A. Morris
General Counsel

Enclosure

Rec'd 10/20/83
10:05 AM

OFFICE OF BAR COUNSEL
THE BOARD ON PROFESSIONAL RESPONSIBILITY
DISTRICT OF COLUMBIA COURT OF APPEALS
515 FIFTH STREET, N.W., BUILDING A
WASHINGTON, D.C. 20001
(202) 638-1501

CONFIDENTIAL October 13, 1983

The Honorable Strom Thurmond
Chairman, Senate Judiciary Committee
Dirkson Senate Building
Washington, D.C. 20510

Attention: Duke Short

Dear Senator Thurmond:

The Office of Bar Counsel is authorized by the District of Columbia Court of Appeals to investigate alleged violations of the Code of Professional Responsibility by attorneys. We have initiated a formal investigation on Sherman E. Unger to determine whether his conduct warrants discipline.

We would like to review the transcripts from the Hearing on Mr. Unger by the Senate Judiciary Committee as well as any related documents. We feel that this will expedite our own independent investigation.

We have discussed this matter with Mr. Short. At his suggestion we are writing to you as Chairman of the Senate Judiciary Committee to authorize transmission of the requested transcripts and supporting documents. We would appreciate your prompt attention to this matter. If I may answer any question concerning our authority or procedures please do not hesitate to call me.

We look forward to hearing from you.

Very respectfully,

Thos. H. Henderson Jr.

Thomas H. Henderson, Jr.
Bar Counsel

THH:el

THE DISTRICT OF COLUMBIA BAR
1972

OFFICE OF BAR COUNSEL
THE BOARD ON PROFESSIONAL RESPONSIBILITY
DISTRICT OF COLUMBIA COURT OF APPEALS
515 FIFTH STREET, N.W., BUILDING A
WASHINGTON, D.C. 20001
(202) 638-1501

CONFIDENTIAL October 17, 1983

The Honorable Strom Thurmond
Chairman, Senate Judiciary Committee
Dirkson Senate Building
Room 226
Washington, D.C. 20510

Attention: Duke Short

Dear Senator Thurmond:

In response to your request for written information concerning the authority of Bar Counsel, we have enclosed an excerpt from the Rules of the District of Columbia Court of Appeals. The provisions of Rule XI deal with the authority of Bar Counsel to investigate allegations of professional misconduct by attorneys licensed to practice in the District of Columbia .

Also enclosed is a brochure which describes our authority and procedures.

We hope the enclosed materials satisfy your request. Please contact us if we may provide further information which might expedite our inquiry on Sherman E. Unger.

Sincerely,

Thos H Henderson, Jr.

Thomas H. Henderson, Jr.
Bar Counsel

THH/sep

Enclosure

DISTRICT OF COLUMBIA COURT OF APPEALS

Editor's Note: Due to the extent of the change made by the Court of Appeals, no attempt has been made to show the previous wording of Rules X and XI.

RULE X

RULES OF PROFESSIONAL CONDUCT

The American Bar Association's Code of Professional Responsibility, as amended by the Court (See Appendix A for amendments to date), shall provide the standards governing the practice of law in the District of Columbia. Amendments thereto adopted by the American Bar Association shall be deemed incorporated therein as of the ABA's effective date unless the Court, sua sponte, defers the effectiveness of any such amendment, or unless the Bar, or any voluntary bar association, within 90 days prior to the ABA's effective date petitions the Court to reject or modify said amendment.

RULE XI

DISCIPLINARY RULES

Section 1 - JURISDICTION.

Any attorney who engages in the practice of law within the District of Columbia as defined in Rule 46 II-(b) of the general rules of the Court [exclusive of those persons described in Rule 46 II(b)(4) who are not members of the Bar of the District of Columbia Court of Appeals] is subject to the disiplinary jurisdiction of this court and its Board on Professional Responsibility.

Nothing herein contained shall be construed to deny to any other court in this jurisdiction such powers as are necessary for any such court to maintain control over proceedings conducted before it, such as the power of contempt, nor to prohibit a voluntary bar association from censuring, suspending, or expelling its members from membership in the association.

Section 2 - GROUNDS FOR DISCIPLINE.

The license to practice law in the District of Columbia is a continuing proclamation by the Court that the holder is fit to be entrusted with professional and judicial matters, and to aid in the administration of justice as an attorney and as an officer of the Court. It is the duty of every recipient of that privilege to conduct himself at all times, both professionally and personally, in conformity with the standards imposed upon members of the Bar as conditions for the privilege to practice law.

Acts or omissions by an attorney, individually or in concert with any other person or persons, which violate the attorney's Oath of Office or the Code of Professional Responsibility as from time to time is in

* We thank Rules Service Co. for permission to duplicate this material.

effect in the District of Columbia, shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship.

Conviction of a crime shall similarly be grounds for discipline as set forth in § 15 of this rule.

Section 3 - TYPES OF DISCIPLINE.

Misconduct shall be grounds for:

(1) Disbarment by the Court; or

(2) Suspension by the Court for an appropriate fixed period of time, or for an appropriate fixed period of time and an indefinite period concurrently, or thereafter to be determined by conditions imposed by the judgment. A suspension of one year or less shall not require proof of rehabilitation for reinstatement. A suspension of more than one year shall require proof of rehabilitation, to be demonstrated in a reinstatement proceeding pursuant to § 21 of this rule. No suspension shall be ordered for a specific period in excess of five years; or

(3) Temporary suspension by the Court. On petition of the Board on Professional Responsibility authorized by its Chairman or Vice-chairman, supported by an affidavit demonstrating facts personally known to affiant, showing that an attorney appears to be causing great public harm by misappropriating funds to his own use, or by other means, the Court may issue an order with such notice as the Court may prescribe imposing temporary conditions of probation on the attorney or temporarily suspending the attorney, or both. Any order of temporary probation which restricts the attorney maintaining a trust account shall, when served on any bank maintaining an account against which the attorney may make withdrawals, serve as an injunction to prevent the bank from making further payment from the account or accounts on any obligation except in accordance with restrictions imposed by the Court. An order of temporary suspension issued under this rule shall preclude the attorney from accepting any new cases, but shall not preclude his continuing to represent existing clients during the first 30-day period after issuance of such temporary order; however, any fees tendered to the attorney during the 30-day period shall be deposited in a trust fund from which withdrawals may be made only in accordance with restrictions imposed by the Court. The attorney may for good cause request dissolution or amendment of the temporary order by petition filed with the Court, a copy of which shall be served on Bar Counsel. The petition for dissolution shall be set for immediate hearing before the Board on Professional Responsibility or a panel of at least three of its members designated by the Chairman of the Board or, in his absence, by the Vice-chairman. The Board or its designated panel shall hear the petition forthwith and submit its report and recommendation to the Court with the utmost speed consistent with fairness. Upon receipt of the report, the Court shall continue or modify its order, as appropriate, until final disposition of all pending disciplinary charges against the attorney; or

(3) The Board shall have the power and duty:

(a) To consider and investigate any alleged ground for discipline or alleged incapacity of any attorney called to its attention, or upon its own motion, and to take such action with respect thereto as shall be appropriate to effect the purposes of these disciplinary rules.

(b) To appoint Bar Counsel and such Assistant Bar Counsel and staff as may from time to time be required properly to perform its functions hereinafter prescribed and fix their compensation. (Bar Counsel and Assistant Bar Counsel hereinafter are referred to collectively as Bar Counsel.)

(c) To appoint two or more hearing committees, each committee consisting of three members, of whom at least two must be members of the Bar of the Dostrict of Columbia, to conduct hearings into formal charges of misconduct, and to submit their findings and recommendations, together with the record, to the Board.

(d) To assign, through its Chairman, periodically and on a rotating basis, an attorney member of each hearing committee to review and approve or modify recommendations by Bar Counsel for dismissals, informal admonitions, and the institution of formal charges.

(e) To review, upon application by Bar Counsel, a determination by a hearing committee that a matter should be concluded by dismissal or by informal admonition without the institution of formal charges.

(f) To assign, through its chairman, formal charges to a hearing committee.

(g) To review the findings and recommendations of hearing committees with respect to formal charges and to prepare and forward its own findings and recommendations, together with the record of the proceeding before the hearing committee and the Board, to this court.

(h) To reprimand attorneys subject to the jurisdiction of this court for misconduct.

(i) To adopt rules of procedure not inconsistent with the rules promulgated by this court.

(4) Censure by the Court; or (5/18/78)

(5) Reprimand by the Board on Professional Responsibility; or (5/18/78)

(6) Informal admonition by Bar Counsel; or (5/18/78)

(7) Probation by the Court in conjunction with or in lieu of other discipline. (5/18/78)

The Court also may require an attorney to take and pass a professional responsibility examination and/or to make restitution either to persons financially injured by the lawyer's conduct or to the Clients' Security Trust Fund (see Rule XII ~~XIV~~), as the case may be.

Section 4 - THE BOARD ON PROFESSIONAL RESPONSIBILITY (5/18/78)

(1) The Court shall appoint a board to be known as the "Board on Professional Responsibility" (hereinafter referred to as the Board) which shall consist of seven members of the Bar of the District of Columbia and two members who are not lawyers. The attorney members shall be appointed from a list submitted by the Bar containing the names of not fewer than three active members of the Bar for each attorney vacancy to be filled. The non-lawyer members shall be selected by the Court. In appointing non-lawyer members, the Court shall consider, but not be limited to, nominees whose names are submitted to the Court in writing by the Bar or by any other organization (voluntary bar or otherwise) or individual. One of the attorney members shall be designated by the Court as Chairman of the Board and another as Vice-Chairman to act in the absence or disability of the Chairman.

(2) When the first two non-lawyer members are selected, one shall be appointed for a term of two years, and the other shall be appointed for a term of three years. Thereafter, as already has come to be the case with respect to those members of the Board who are members of the Bar, all regular terms shall be for three years. Upon the completion of a regular term, a member shall continue to serve until a successor is appointed. The Board shall act only with a concurrence of a majority of its members present and voting; provided, however, that six members of the Board shall constitute a quorum for adjudicative matters and five members shall constitute a quorum for administrative matters. The Board shall act only with a concurrence of a majority of its members present and voting except that in adjudicative matters the Board shall act only with a concurrence of a majority of its entire membership.

(j) Notwithstanding the provisions of paragraph (3)(b) of this section, the Board of Governors may adopt or reject a proposed budget of the Board on Professional Responsibility, but in the event of a dispute between the Board of Governors and the Board on Professional Responsibility as to the amount of the latter's proposed budget, or any of its budget items, the Court shall resolve such dispute upon application by either Board.

(k) To assist the Court in its duty to oversee the functioning of the Board, the Court in its discretion may request that it be provided for informational purposes with the file in any case which has been disposed of by dismissal, informal admonition, or reprimand.

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The Board on Professional Responsibility shall, to the extent it deems feasible, consult with officers of the Bar and of voluntary bar associations in the District of Columbia concerning any appointments which it is authorized to make.

Section 5 - HEARING COMMITTEES.

(1) Each hearing committee shall consist of three members, at least two of whom must be members of the Bar of the District of Columbia. When a hearing committee is first selected, one of its members shall be appointed for a term of one year, another member for a term of two years, and the third member for a term of three years. Thereafter, all regular terms shall be for three years, and no member shall serve for more than two successive three-year terms. Upon the completion of a regular term, a member shall continue to serve until a successor is appointed. A member who has served two successive three-year terms may be reappointed after the expiration of one year. The attorney member of the committee senior in service (or, in the case of a new committee, senior in membership in the Bar) shall be its chairman. The committee shall act only with a concurrence of a majority of its members; provided, however, that two members shall constitute a quorum. If one or more members of a hearing committee cannot be present at a hearing scheduled by that committee, members of other hearing committees may serve, *pro hac vice*, upon designation by the Chairman.

(2) Hearing committees shall have the power and duty;

(a) Through the member assigned by the Board pursuant to paragraph (3)(d) of Section 4 of this rule to review and approve or modify recommendations by Bar Counsel for dismissals, informal admonitions, and the institution of formal charges. In the event of a disagreement between Bar Counsel and the reviewing member, the case shall be referred to the full committee of which the attorney is a member for a probable cause hearing. If that committee finds probable cause, it shall refer the matter to the Chairman of the Board for assignment to another hearing committee for a formal hearing. If that committee does not find probable cause, it shall dismiss the action subject to the right of Bar Counsel to seek review of such ruling by the Board.

(b) To conduct hearings into formal charges of misconduct upon assignment by the Chairman of the Board.

(c) To submit their findings and recommendations, together with the record of the hearing, to the Board.

Section 6 - BAR COUNSEL.

(1) Bar Counsel shall have the power and duty:

(a) With the approval of the Board, to employ and supervise the staff needed for the performance of his duties.

(b) To investigate all matters involving alleged misconduct by an attorney subject to the jurisdiction of this court called to his attention, whether by complaint or otherwise.

(c) To dispose of all matters involving alleged misconduct by an attorney subject to the jurisdiction of this court, upon prior approval of an attorney member of a hearing committee, by dismissal or informal admonition, or referral of charges. Except in matters requiring dismissal because the complaint is clearly unfounded on its face or falls outside the Board's jurisdiction, no disposition shall be recommended or undertaken by Bar Counsel until the accused attorney shall have been afforded the opportunity to state his position with respect to the allegations against him.

(d) To prosecute all disciplinary proceedings before hearing committees, the Board, and this court.

(e) To appear at hearings conducted with respect to petitions for reinstatement by suspended or disbarred attorneys, to cross-examine witnesses testifying in support of such a petition, and to marshall available evidence, if any, in opposition thereto.

(f) To maintain permanent records of all matters processed and the disposition thereof.

(g) To file with the Court certificates of convictions of attorneys convicted of crimes.

(h) To submit to the Court on a periodic basis, at least twice a year, a list of cases resulting in informal admonitions by Bar Counsel or reprimands by the Board.

(2) Bar Counsel shall not be permitted to engage in private practice, except that the Board may agree to a reasonable period of transition after appointment.

Section 7 - PROCEDURE.

(1) Investigation. All investigations, whether upon complaint or otherwise, shall be initiated and conducted by Bar Counsel. Upon the conclusion of an investigation, Bar Counsel may dismiss, informally admonish the attorney concerned, or institute formal charges upon prior approval of an attorney member of a hearing committee; provided, however, that the respondent-attorney, following an informal admonition, may demand a formal hearing before a hearing committee, in which event the admonition shall be vacated. If Bar Counsel and the reviewing member of the designated hearing committee disagree as to the disposition of the case, the case shall be submitted to the full hearing committee on which the member serves for a probable cause hearing. If that committee finds probable cause, it shall refer the matter to the Chairman of the Board for assignment to another hearing committee for a formal hearing. If the original committee does not

find probable cause, it shall dismiss the action subject to the right of Bar Counsel to seek review by the Board.

(2) Formal Hearing. Formal disciplinary proceedings before a hearing committee shall be instituted by Bar Counsel by the filing of a petition with the Board (with a copy to the Clerk of the Court) which shall be sufficiently clear and specific to inform the respondent of the alleged misconduct. A copy of the petition shall be served upon the respondent. The respondent shall serve a copy of his answer upon Bar Counsel and file the original with the Board within 20 days after service of the petition, unless the time is extended by the Chairman. In the event the respondent fails to answer, the charges shall be deemed admitted, provided, however, that a respondent who fails to answer within the time provided may obtain permission of the Chairman to file an answer if the failure to file an answer was attributable to mistake, inadvertence, surprise, or excusable neglect.

Following service of the answer or upon failure to answer, the matter shall be assigned by the Chairman to a hearing committee.

A hearing committee member who has reviewed Bar Counsel's recommended disposition of a matter, as set forth in paragraph (1) of this section, shall not take part in any formal disciplinary proceeding regarding the same matter, except for the probable cause hearing referred to in paragraph (1).

If there are any issues of fact raised by the pleadings, or if the respondent requests the opportunity to be heard in mitigation, the hearing committee shall serve a notice of hearing upon Bar Counsel and the respondent, or his counsel, stating the date and place of the hearing at least 15 days in advance thereof. The notice of hearing shall advise the respondent that he is entitled to be represented by counsel, to cross-examine witnesses, and to present evidence in his own behalf.

The hearing committee shall in every case submit a report containing its findings and recommendation, together with a record of its proceedings and briefs, if any were submitted, to the Board within 60 days after the conclusion of its hearing. In the event of a hearing committee's noncompliance with this provision, the Board, in its discretion, may so advise the Court and request intercession by the Court.

(3) Review by the Board and Court. Upon receipt of a report from a hearing committee, the Board shall set the dates for submission of briefs and for oral argument before the Board. If neither the respondent nor Bar Counsel objects to the findings and recommendation of the hearing committee, oral argument and the submission of briefs may be waived by stipulation, subject to the approval of the Board. The Board shall promptly after the conclusion of oral argument or waiver thereof either affirm or modify the recommendation of the hearing committee, remand the matter for further proceedings before the hearing committee, or dismiss the petition. In the event the Board

determines that the proceeding shall be concluded by reprimand, it shall instruct Bar Counsel to so notify the respondent in writing.

Unless the Board shall dismiss or remand the petition or the matter is concluded by reprimand, the Board shall promptly submit a report containing its findings and recommendation, together with the entire record, to the Court. After the filing of the report, a copy thereof shall be served on the respondent. The respondent may file exceptions to the report within 20 days from the date of service of a copy thereof, or within an additional period not to exceed 20 days granted by this court for good cause shown.

If exceptions to the report are filed by the respondent, the Court shall schedule the matter for the submission of briefs and oral argument in accordance with the general rules governing civil appeals. Upon conclusion of the proceedings, or upon consideration of the report if no exceptions thereto are filed by the respondent, the Court shall enter an appropriate order as soon as the business of the Court permits. In considering the appropriate order, the Court shall accept the findings of fact made by the Board unless they are unsupported by substantial evidence of record, and shall adopt the recommended disposition of the Board unless to do so would foster a tendency toward inconsistent dispositions for comparable conduct or otherwise would be unwarranted.

Proceedings before the Board and proceedings, if any, before the Court shall be conducted by Bar Counsel.

The Court reserves the right with respect to all disciplinary proceedings in which a dismissal, informal admonition, or reprimand is contemplated or effectuated to review the matter and to enter an appropriate order with respect thereto, including an order directing further proceedings.

Section 8 - DISCIPLINARY DIVISION.

The Court shall establish a Disciplinary Division consisting of three judges of the Court which shall have the initial jurisdiction over all judicial proceedings involving the disciplining of members of the Bar. Such a division may impose a suspension or censure, but disbarment may be imposed only by the Court *en banc*. Whenever at least two members of the Board recommend disbarment, the case shall be referred initially to the court *en banc*. Additionally, since Bar Counsel appears before the Court on behalf of the Board, in a case in which two or more members of the Board recommend a discipline other than that recommended by the majority of the Board, the Court in its discretion may appoint an attorney to advocate the minority view.

Section 9 - IMMUNITY, COMPLAINTS, BOARD, COMMITTEES, AND BAR COUNSEL.

Complaints submitted to the Board or Bar Counsel shall be absolutely privileged, and no claim or action predicated thereon may be instituted or maintained. Members of the Board, members of hearing committees, and Bar Counsel and all assistants and employees shall be immune from suit for any conduct in the course of their official duties.

Complaints against a member of the Board on Professional Responsibility involving activites other than those performed within the scope of his duties as a board member shall be submitted directly to the Court. Complaints against hearing committee members or Bar Counsel involving activities other than those performed within the scope of their duties as such shall be submitted directly to the Board on Professional Responsibility.

Section 10 - REFUSAL OF COMPLAINANT TO PROCEED, COMPROMISE, ETC.

Neither unwillingness nor neglect of the complainant to sign a complaint or to prosecute a charge, nor settlement, compromise, or restitution, shall, in itself, justify abatement of an investigation into the conduct of an attorney.

Section 11 - RELATED PENDING LITIGATION.

Processing of complaints shall not be deferred or abated because of substantial similarity to the material allegations of pending criminal or civil litigation, unless authorized by the Board in its discretion for good cause shown.

Section 12 - SERVICE.

Service upon the respondent-attorney of notices required under these rules shall be made by personal service by any person authorized by the Chairman of the Board, or by registered or certified mail to the address shown in the most recent registration statement filed by respondent pursuant to Rule II, § 2, or other last known address.

Service of any other paper or notices required by these rules shall, unless otherwise provided by these rules, be made in accordance with Rule 5 of the Civil Rules of the Superior Court of the District of Columbia.

Section 13 - SUBPOENA POWER, WITNESSES, AND PREHEARING PROCEEDINGS.

(1) Oaths; Subpoena. Any member of the Board, or of a hearing committee in matters before it, or Bar Counsel in matters under investigation by him, may administer oaths and affirmations and, subject to Superior Court Civil Rule 45, compel by subpoena the attendance of

witnesses and the production of pertinent books, papers, and documents. A respondent may, subject to Superior Court Civil Rule 45, compel by subpoena the attendance of witnesses and the production of pertinent books, papers, and documents before a hearing committee after formal disciplinary proceedings are instituted.

Subpoenas issued during the course of an investigation shall clearly indicate on their face that the subpoenas are issued in connection with a confidential investigation under these rules and that it would be regarded as contempt of the Court or grounds for discipline under these rules for a person subpoenaed to breach in any way the confidentiality of the investigation. It shall not be regarded as a breach of confidentiality for a person subpoenaed to consult with an attorney.

(2) Witnesses and Fees. The Superior Court may, upon proper application, enforce the attendance and testimony of any witnesses and the production of any documents so subpoenaed. Subpoena and witness fees and mileage shall be the same as those in the Superior Court.

(3) Quashing Subpoena. Any attack on the validity of a subpoena so issued shall be heard and determined by a hearing committee designated by the Chairman of the Board.

(4) Discovery Limited. The respondent shall be entitled as of right to reasonable discovery proceedings in accordance with rules to be promulgated by the Board. Rulings with respect to such discovery proceedings shall be made by the hearing committee to which the matter has been assigned for hearing. Objections to rulings by the hearing committee shall be preserved and may be raised upon appeal to the Board from the final decision of the hearing committee. No intermediate appeals will be permitted.

(5) Prehearing Conference. At the discretion of the hearing committee, a conference may be ordered for the purpose of obtaining admissions or otherwise narrowing the issues presented by the pleadings. The conference may be held before the chairman of the committee or any member of the committee designated by its chairman.

(6) Testimony. With the approval of the hearing committee, testimony may be taken by deposition or by commission if the witness is not subject to service of a subpoena or is unable to attend or testify at the hearing because of age, illness, or other infirmity. A complete record of the testimony so taken shall be made and preserved.

(7) Protective Orders. The subpoena and deposition procedures shall be subject to the protective requirements of confidentiality provided in § 23 of this rule.

Section 14 - REQUIRED RECORDS.

Every attorney subject to these rules shall maintain complete records of the handling, maintenance, and disposition of all funds, securities, and other properties of a client at any time in his possession, from the time of receipt to the time of final distribution, and shall preserve such records for a period of five years after final distribution of such funds, securities, or other properties or any portion thereof. (Added January 12, 1978)

[EDITOR'S NOTE: Section 15 has been so extensively revised, that the previous wording has not been shown.]

Section 15 - ATTORNEYS FOUND GUILTY OF SERIOUS CRIMES.

(1) Upon the filing with the Court of a certified copy of the court record (e.g., docket entry showing verdict or finding) demonstrating that an attorney has been found guilty of a serious crime as hereinafter defined, the Court shall enter an order immediately suspending the attorney, whether the finding resulted from a plea of guilty or *nolo contendere* or from a verdict after trial or otherwise, and regardless of the pendency of an appeal, pending final disposition of a disciplinary proceeding to be commenced upon such finding. Upon good cause shown, the Court may set aside such order of suspension when it appears in the interest of justice so to do.

(2) The term "serious crime" shall include any felony and any lesser crime a necessary element of which, as determined by the statutory or common law definition of such crime, involves improper conduct as an attorney, interference with the administration of justice, false swearing, misrepresentation, fraud, wilful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a "serious crime."

(3) A certified copy of the court record of a guilty finding against an attorney for any crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against him based thereon.

(4) Upon the receipt of a certified court record of a guilty finding against an attorney for a serious crime, the Court shall, in addition to suspending him in accordance with the provisions of paragraph (1) above, also refer the matter to the Board for the institution of a formal proceeding before a hearing committee, in which the sole issue to be determined shall be the nature of the final discipline to be imposed, provided that a disciplinary proceeding so instituted will not be brought to hearing until all appeals from conviction of the crime are concluded.

(5) Upon the receipt of a certified court record of a guilty finding against an attorney for a crime not constituting a serious crime, the Court shall refer the matter to the Board for whatever action it may

deem warranted, including the institution of an investigation by Bar Counsel or a formal proceeding before a hearing committee; provided, however, that the Court may in its discretion make no reference with respect to minor offenses.

(6) An attorney suspended under the provisions of paragraph (1) above will be reinstated immediately upon the filing of a certificate demonstrating that the underlying finding has been reversed, vacated, or set aside, but the reinstatement will not terminate any formal disciplinary proceeding then pending against the attorney, the disposition of which shall be determined by the hearing committee and the Board on the basis of the available evidence.

(7) The Clerk of the District of Columbia court in which an attorney is found guilty of a crime should within 10 days of said finding transmit a certified copy of the court record thereof to this Court.

(8) Upon being advised that an attorney subject to the disciplinary jurisdiction of this Court has been found guilty of a crime, Bar Counsel shall determine whether the Clerk of the court where the finding occurred has forwarded a certified copy to this Court in accordance with the provision of paragraph (7) above. If the certified copy has not been forwarded by the Clerk or if the finding occurred in another jurisdiction, it shall be the responsibility of the Bar Counsel to obtain a certified copy of the finding and transmit it to this Court.

(9) Notwithstanding the provisions of paragraph (8) of this section, the attorney shall have a concomitant obligation to file a certified copy of the court record of his guilty finding with Bar Counsel and the Clerk of this Court.

Section 16 - PROCEEDINGS WHEN AN ATTORNEY IS DECLARED TO BE INCOMPETENT OR IS ALLEGED TO BE INCAPACITATED. (Added January 12, 1978)

(1) When an attorney has been judicially declared incompetent or involuntarily committed to a mental hospital, the Court, upon proper proof of that fact, shall enter an order suspending such attorney from the practice of law effective immediately and for an indefinite period until further order of the Court. A copy of such order shall be served upon such attorney, his guardian, and/or the director of the mental hospital in such manner as the Court may direct.

(2) If, at any time prior to its final disposition of a disciplinary proceeding, the Board has good cause to believe that the mental or physical condition of the respondent is relevant to the subject matter of the complaint and is a factor which should be considered by it, it may apply to the Court for an order requiring the respondent to submit to an appropriate examination, such application to be by petition on notice to the respondent and accompanied by a statement by the Board setting forth in detail its reasons for the application and the relevance of the examination to its investigation or deliberations.

(3) Whenever the Board shall petition the Court to determine whether an attorney is incapacitated from continuing the practice of law by reason of mental infirmity or illness or because of addiction to drugs or intoxicants, the Court may take or direct such action as it deems necessary or proper to determine whether the attorney is so incapacitated, including the examination of the attorney by such qualified medical experts as the Court shall designate. If, upon due consideration of the matter, the Court concludes that the attorney is incapacitated from continuing to practice law, it shall enter an order suspending him on the Ground of such disability for an indefinite period and until further order of the Court, and any pending disciplinary proceeding against the attorney shall be held in abeyance. In a case of addiction to drugs or intoxicants, the Court alternatively may consider the possibility of probationary conditions.

The Court may provide for such notice to the respondent of proceedings in the matter as is deemed proper and advisable and may appoint an attorney to represent the respondent if he is without adequate representation.

(4) If, during the course of a disciplinary proceeding, the respondent contends that he is suffering from a disability by reason of mental or physical infirmity or illness, or because of addiction to drugs or intoxicants, which makes it impossible for the respondent adequately to defend himself, the Court thereupon shall enter an order immediately suspending the respondent from continuing to practice law until a determination is made of the respondent's capability to continue to practice law in a proceeding instituted in accordance with the provisions of paragraph (3) of this section.

If, in the course of a proceeding under this rule or in a disciplinary proceeding, the Court shall determine that the respondent is not incapacitated from practicing law, it shall take such action as it deems proper and advisable, including a direction for the resumption of the disciplinary proceeding against the respondent.

(5) Any attorney suspended under the provisions of this rule shall be entitled to apply for reinstatement once a year, or at such shorter intervals as the Court may direct in its order of suspension or any modification thereof. Such application shall be granted by the Court upon a showing by clear and convincing evidence that the attorney's disability has been removed and that he is fit to resume the practice of law. Upon such application, the Court may take or direct such action as it deems necessary or proper to a determination of whether the attorney's disability has been removed, including a direction for an examination of the attorney by such qualified medical experts as the Court shall designate. In its discretion, the Court may direct that the expense of such an examination shall be paid by the attorney, and that the attorney establish proof of his competence and learning in the law, which proof may include certification by the bar examiners of his successful completion of an examination for admission to practice.

When an attorney has been suspended by an order in accordance

LAW OFFICES
BARNETT & ALAGIA
1000 THOMAS JEFFERSON STREET, N.W.
WASHINGTON, D.C. 20007
(202) 342-0342
TELECOPIER (202) 775-9089
CABLE ALBAR
TELEX 89-2445

HUGH SCOTT
PARTNER

OFFICES IN
LOUISVILLE, KENTUCKY
PALM BEACH, FLORIDA
FRANKFORT, KENTUCKY
NASHVILLE, TENNESSEE
ATLANTA, GEORGIA
NEW ALBANY, INDIANA

October 26, 1983

Dennis W. Archer, Esquire
President
National Bar Association Inc.
4000 Penobscot Building
Detroit, Michigan 48226

Re: Nomination of Sherman E. Unger for the
Court of Appeals for the Federal Circuit

Dear Mr. Archer:

I regret that I inadvertently misinterpreted your letter of September 23, 1983 to the Judiciary Committee of the United States Senate. My comments reflect my understanding at the time, but your letter makes clear that this is indeed a misunderstanding and I regret it.

I am sending a copy of this letter to Senator Thurmond.

Sincerely yours,

Hugh Scott

Hugh Scott

HS/sho
cc: Senator Strom Thurmond ✓
Sherman E. Unger, Esquire

HAROLD D. KLETSCHKA, M.D.
1925 Noble Drive
Minneapolis, Minnesota 55422

(612) 522-1925

October 25, 1983

Certified Mail No. P23 2004556

SPECIAL DELIVERY

RE: Sherman Unger hearings

Senator Strom Thurmond
Chairman
Senate Judiciary Committee
United States Senate
Washington, D. C. 20510

Attention: Mr. Duke Short
Chief of Investigations

Dear Senator Thurmond:

Pursuant to the directions I received from Mr. Joe Kopka in a phone conversation yesterday, I am submitting my testimony in the Sherman Unger hearings in written form.

Mr. Kopka assured me my testimony, including the exhibits, would be included in the printed record to be published in connection with the hearings. He also told me I will be furnished a copy of the printed record when it is available.

My testimony concerns a personal first-hand account of the seriousness of ex parte activities which is one of the issues which has been raised in these hearings. Inasmuch as each member of your Committee will be assessing the significance of that factor in deciding how to cast his vote, I would appreciate my testimony being called to the attention of each Senator on your Committee. Also, at the time Mr. Unger's confirmation proceedings reach the full Senate --- in the event they do --- I would appreciate each U. S. Senator receiving a copy of my testimony so he can weigh the significance of any ex parte behavior on the part of Mr. Unger against what I have disclosed.

Thank you very much for the opportunity to present my views. I also appreciate the courtesies extended to me by Mr. Short and Mr. Kopka.

I look forward to receiving a copy of the printed record in this case, including my testimony, when it is available.

Sincerely yours,

Harold D. Kletschka, M.D.

Harold D. Kletschka, M. D.

Encl.: Testimony of Dr. Kletschka with Exhibits A, B, C, D, & E.

TESTIMONY

of

HAROLD D. KLETSCHKA, M. D.

to

SENATE JUDICIARY COMMITTEE

UNITED STATES SENATE

WASHINGTON, D. C. 20510

In Connection With

HEARINGS HELD PURSUANT TO CONFIRMATION PROCEEDINGS CONCERNING THE NOMINATION OF MR. SHERMAN UNGER TO A POSITION AS FEDERAL JUDGE.

October 25, 1983

I appreciate the opportunity granted me by this distinguished body to present my views on a topic about which I hold strong convictions.

I do not know Mr. Sherman Unger nor do I have first-hand knowledge about activities in which he has engaged. Therefore, my concerns are related simply to the matters I have learned about in the public forum. According to news media accounts, I understand Mr. Unger is alleged to have engaged in ex parte activities with the court during times he has represented parties as their attorney. I further understand the American Bar Association is opposing Mr. Unger's appointment as a federal judge on the basis of those ex parte activities.

If, indeed, Mr. Unger was involved in ex parte activities as alleged, then I want to join the American Bar Association in opposing the appointment of Mr. Unger to a position on the federal bench.

I have had first-hand experience as to the destructive consequences that flow from ex parte activities between litigants and the court. I have learned that such activities can never be considered "inconsequential", "innocent", "inadvertent", "only a technical misadventure", or viewed from any other similar perspective. Such behavior must never be treated in anything but the most serious terms. There is no such thing as an improper ex parte communication so insignificant that it warrants anything but the most severe condemnation. It is predictable that toleration of ex parte behavior will necessarily lead to a breakdown in the American judicial system and, ultimately, to its complete destruction.

I join the American Bar Association in their abhorrence and condemnation of ex parte conduct. This attitude stems from a realistic recognition that ex parte behavior must of necessity be associated with intolerable evil consequences.

From my first-hand personal experience I submit the following observations:

1. The only time there is justification for an ex parte contact is in the setting of a bona fide urgent or emergency situation surrounding the need for a temporary restraining order. But even in such an instance, the potential unilateral adverse impact can often be blunted by dealing with the matter in open court with a public record made of the proceedings. Except for such unusual circumstances the only reason a party can have for approaching the court ex parte is to seek to gain a unilateral advantage or favor from the court because that party realizes his position is so untenable he dare not test it in a proper adversary proceeding.
2. Once a judge has submitted to improper ex parte dealings he is forever thereafter vulnerable to undue influences.

3. Inasmuch as ex parte meetings are designed to gain, by ulterior means, an advantage not properly attainable lawfully, the judge, in order to fulfill his "obligation" issues rulings that are bizarre and establish precedents adversely affecting future litigants in the jurisdiction.
4. Although no basis in fact or law exists to support the rulings issued by the judge in favor of the ex parte litigant, the bona fide litigant may find it impossible to appeal the decision effectively because a staggering burden of proof may be shifted to him. In addition, the bona fide litigant may be faced with an unwarranted expense tied to the appeal, and a cost which may be so overwhelming it becomes financially prohibitive for him to appeal.
5. Even when an illicit ex parte cabal has been identified and documented, the bona fide litigant will find his own attorney, despite the Canon of Judicial Ethics by which he is bound, unwilling to act to "take on a federal judge" and seek his recusal in open court on that basis. In other words, even though the ex parte practice is proven, the bona fide litigant cannot free himself from its evil consequences.
6. Even when the success of the bona fide litigant turns on the unlawfulness of the ex parte practices, he will find it impossible to make his attorney present those activities to the appellate court for their review.
7. The bona fide litigant will find that his attorney, in order to extricate himself from an uncomfortable situation, will threaten him by such means as immediately calling legal fees due thereby threatening his client with possible bankruptcy; or to continue the legal proceedings, but in an ineffective or even counterproductive

way, to pile up additional fees and expenses to further compromise, burden, and intimidate his client. The bona fide litigant has no recourse for appeal to remedy his plight, because he has to turn to the same forum already involved in conscious illicit efforts to destroy him. The bona fide litigant is then forced into a settlement which is unthinkably adverse, not only to himself, but the general welfare and mankind as well.

8. Even though the bona fide litigant finally establishes, beyond successful rebuttal, the existence and illicit nature of the ex parte communications, and that they have resulted in unparalleled injuries, he will find the U. S. Congress --- and I speak here of the House Judiciary Committee, because that group has been designated as the governmental body charged with initiating impeachment proceedings --- looks with favor on such behavior, manifested by a refusal to hold the errant judge and ex parte litigants accountable.
9. Once the judge realizes his immunity is absolute he is encouraged to expand and continue his ex parte practices.
10. Because the official governmental entities charged with watchdogging improper and unlawful practices refuse to act or intervene, a Constitutional crisis is the necessary result. This crisis arises by virtue of the fact a federal judge may ignore judicial precedents, statutory laws, and Constitutional provisions; and manufacture on the bench, ad hoc, whatever law he wishes in a given instance. He may do all this in the most clandestine way without fear of reprisal or accountability. Each federal judge, then, becomes a complete sovereign entity. As the practice gains momentum, national anarchy surely will result, and our nation will not sur-

vive, as Thomas Jefferson predicted, because, as he said, impeachment will be used only as "scarcely a scarecrow".

My personal experiences on which I base the above cited observations are included in Exhibits A, B, C, D, and E (each identified, infra), all incorporated herein by reference. The contents of those Exhibits remove any possibility that my above disclosed observations are in any way conjectural. The disclosures therein concern illicit ex parte activities engaged in by The Honorable Miles W. Lord, Chief Judge, United States District Court, District of Minnesota; and parties representing a group of insurgents (defendants) in a proxy contest which arose in 1977. I was one of the plaintiffs in the litigation. Judge Lord's indefensible actions destroyed a company, the most advanced artificial heart project in the world, forty-five years of astounding research work, and cost 18,000,000 - 20,000,000 lives a year.

In the event the alleged ex parte activities are established in the instant case, I urge with all earnestness that confirmation of Mr. Unger to a federal bench position be denied. It is important that a signal be sent out that ex parte activities will not be condoned by those charged with safeguarding the lawful interests of the citizens of this country.

I do not fault the patronage system. But other positions, not so intimately related by profession to the area of unacceptable behavior (if such is established), could certainly be found in which the particular expertise of the nominee may be employed to advantage.

Thank you for the opportunity to submit this testimony. I am at your disposal in the event you wish any additional information.

EXHIBIT A: "ADDRESS before the SHAREHOLDERS OF BIO-MEDICUS, INC. at the ANNUAL MEETING OF SHAREHOLDERS held on August 26, 1983", ADDRESS BY Harold D. Kletschka, M. D.

EXHIBIT B: "PASSOUT". Comments made by Dr. Kletschka at the April, 1969 meeting of the American Society for Artificial Internal Organs and published in VOLUME XV of the TRANSACTIONS of that Society.

EXHIBIT C: PETITION to the United States Congress for the Impeachment of The Honorable Miles W. Lord, Chief Judge, United States District Court, District of Minnesota.

EXHIBIT D: Article by Larry Millett entitled, "Lawyer has 'about had it' with Federal Judge" which appeared in the September 17, 1983 issue of the St. Paul Pioneer Press/ Dispatch.

EXHIBIT E: Article by Margaret Zack entitled, "Meshbesher Asks Judge Murphy to Disqualify Herself from Case" which appeared in the September 21, 1983 issue of the Minneapolis Star and Tribune.

Respectfully yours,

Harold D. Kletschka, M.D.

Harold D. Kletschka, M. D.
1925 Noble Drive
Minneapolis, Minnesota 55422

October 25, 1983

EXHIBITS CAN BE FOUND IN THE
COMMITTEE FILES

TAFT, STETTINIUS & HOLLISTER
FIRST NATIONAL BANK CENTER
FOUNTAIN SQUARE
CINCINNATI, OHIO 45202
513-381-2838
CABLE TAFTHOL TWX 810-461-2823

WASHINGTON, D.C. OFFICE
SUITE 600
21 DUPONT CIRCLE, N.W.
WASHINGTON, D.C. 20036
202-223-8851

ROBERT TAFT, JR
RANDOLPH J. STAYIN

VIRGINIA E. HOPKINS
JOAN M. KOVALIC
ARTHUR B. PEARLSTEIN

COLUMBUS, OHIO OFFICE
SUITE 1000
33 NORTH HIGH STREET
COLUMBUS, OHIO 43215
614-221-2838

DAYTON, OHIO TELEPHONE 222-0050

J. MACK SWIGERT
ROBERT TAFT, JR
MURRAY S. MONROE
SYDNOR I. DAVIS
ROBERT G. STACHLER
FRANK H. STEWART
JAMES J. RYAN
ROBERT J. TOWNSEND
THOMAS T. ALLMAN
JEROLD A. FINK
FREDERICK O. KIEL
MELVIN S. SHOTTEN
ROBERT W. MAXWELL II
JOHN P. WILLIAMS, JR
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DAVID L. JOHNSON
LAWRENCE J. BARTY
LAWRENCE D. WALKER
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LEONARD A. WEAKLEY
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CHARLES D. LINDBERG
JAMES R. BRIDGELAND, JR
WILLIAM V. FINN
WILBUR L. COLLINS
L. CLIFFORD CRAIG
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RONALD R. NEWBANKS
THOMAS D. HEEKIN
J. ALAN LIPS
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CYNTHIA F. BLANK
STEPHEN M. NECHEMIAS
G. DAVID SCHIERING
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RICHARD S. ROBERTS
RICHARD D. SPOON
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THOMAS T. TERP
ROGER A. WEBER
ROSS E. WALES

JAMES M. HALL, JR
W. STUART DORNETTE
FRANCIS V. GUDORF
DANIEL J. HOFFHEIMER
TIMOTHY J. HURLEY
JOHN J. MCCOY
MARGARET WALKER COMEY
TIMOTHY P. REILLY
JEFFREY B. KELLY
STEVEN N. STEIN
THOMAS R. SCHUCK
JEFFREY S. CREAMER
MICHAEL W. HOLLINGSWORTH
SCOTT A. SIEBELS
MICHAEL J. ZAVATSKY
DANIEL O. CONKLE
* STEPHEN M. GRIFFITH, JR
BARTON A. BIXENSTINE
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BARBARA E. ULLMAN
KIM K. BURKE
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MARK J. STEPANIAK
ANNE COLE PIERCE
STEVEN P. MATTEUCCI
DAVID I. THOMPSON
DAVID COLKER
MARGARET A. LAWSON

JOHN W. HUDSON
DAVID G. GAMBLE
ROBERT T. KEELER
OF COUNSEL

* ON MILITARY LEAVE

October 25, 1983

VIA FEDERAL EXPRESS

The Honorable Strom Thurmond
Chairman, Senate Judiciary Committee
United States Senate
Room 218
Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Thurmond:

Mr. Coleman of the American Bar Association Standing Committee on the Federal Judiciary has asked that I respond to you on Sherman Unger's two references to me in his testimony before your Committee. I have reviewed the necessary extracts of his testimony and now write on these two references:

1. At pages 19-20, Mr. Unger goes out of his way in referring to me as "the other man that has been criticizing me" to quote language from a charge filed by Judge C. G. Neece on July 12, 1968, against me that I had "so obstructed the proper administration of justice...as to block me in the performance of my judicial duties" and had committed "a multiple of apparently contemptuous acts" during the trial. This charge was openly filed with the Clerk of the Federal Court in Cincinnati over two years after the case of W. R. Grace and Co. v. Hargadine was tried before him and received appropriate newspaper publicity. What Mr. Unger did not relate to the Committee is that I filed a 40-page response (with 26 appendices) to Judge Neece's charge two months later, repeatedly asked, to no avail, for a hearing and action on the charge, and finally on January 28, 1976 (almost eight years later), after no hearing, the charge was ordered to be vacated by the Court in Cincinnati (Exhibit A attached) with Judge Neece's concurrence. The charge was vacated without reaching "the question of whether the facts set forth...in the Memorandum and Certification of July 12, 1968, constitute a 'contempt'...".* Moreover, after an exhaustive inquiry, the Grievance Committee of the Cincinnati Bar Association on January 21, 1970, adopted a resolution, later approved by the Executive Committee, finding no misconduct on my part in the matter of Judge Neece's charges (Exhibit B attached). For some strange reason, Mr. Unger also omitted references to this in his testimony before your Committee.

2. At pages 133-134, Mr. Unger was questioned about the assertion by me that in the same case on trial in Cincinnati he had sought and gained an ex parte order from the Judge (without notice to me and without my knowledge) that a deposi-

---

*While Judge Neece adhered in a footnote to his assertion that the facts, if "reached", constituted contempt, Judge Hogan disagreed and was "of the view that the conduct involved was and is within the bounds of the 'great latitude in the area of vigorous advocacy' rule of the McConnell case". 370 U.S. 230 (page 3, Exhibit A attached).

tion should be taken on the next day in Los Angeles, California, for use in the case. He denied before the Committee any recollection of this incident, resting comfortably on the explanation that this was the same case "in which Mr. Keeler was found contemptuous continually". (See preceding paragraph.) What Mr. Unger did not tell the Committee is that he did go by air to Los Angeles on the same day when he got his ex parte order, failed to take the deposition because the deponent did not appear, and thereafter sought by written motion before Judge Neece with supporting memorandum written and signed by him (a) for a judgment dismissing the action against his clients for my failure to respond to the ex parte order or (b) in the alternative, to have the plaintiff found in contempt for failure to comply with an order Mr. Unger had got ex parte. The judge never acted on this motion, which was later withdrawn, having exacted its measure of distraction and trouble for me. It is impossible to believe that he cannot remember this series of events, except on the proposition that he did not want to be questioned about it.

I must respectfully suggest, without by any means knowing all that the Committee has heard and seen, that on these two points alone the Committee could readily recall Mr. Unger and listen carefully to what he says. This man is most cavalier in his treatment of the facts and what is before him, twisting and turning what he does not like, particularly when he believes that he may get by with no accountability. Therein lies the essence of the necessary integrity of a judge. Sherman Unger materially lacks that integrity. There are many others who have it and are otherwise fully qualified for the important judicial position to which he has been nominated. His nomination should not be confirmed.

Sincerely yours,

Robert T. Keeler

Robert T. Keeler

bjh

Enclosures

cc William T. Coleman, Esq.

[Copies enclosed for other Committee members and staff.]

FILED
JOHN D. LYTER, CLERK
JAN 28 10 11 AM '76
U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
WEST DIV. CINCINNATI

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION

W. R. GRACE & COMPANY,]
]
Plaintiff]
]
v.] Civil Action No. 5723
]
CLYDE C. HARGADINE, et al,]
]
Defendants]

MEMORANDUM

BEFORE: Neese[1] and Hogan[2].

HOGAN, J.: The trial of the issues by the Plaintiff Grace & Company and Hargadine, et al, commenced early in May, 1966, after extensive pre-trial proceedings. The Judge by Designation presided at the pre-trial as well as the trial (jury) proceedings. The captioned matter has been aptly described, trial-court-wise, as "an unusually difficult and complex lawsuit.* * * There were many witnesses and some 5,000 exhibits. * * * The litigants were represented by two of the leading law firms in a large metropolitan area." The result in the trial court was a judgment in favor of the Plaintiff Grace, based on a jury verdict, in excess of $325,000 (which included compensatory and punitive damages). The issues in

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1/ U. S. District Judge, S.D.O.H., by designation. In 1966 Judge Neese, U.S.D.J., E.D. Tenn., accepted a designation of indefinite duration, to sit in the S. D. of Ohio for the purpose of presiding at the trial of the captioned case. The Certification of July 12, 1968, described in this Memo, was filed in the captioned case and is therefore within the designation. Judge Neese is referred to in this Memo as the Judge-by-Designation.

2/ Chief (since 9/19/75) U. S. District Judge, S. D. Ohio.

EXHIBIT A

the case were bitterly contested. The judgment was appealed and was finally affirmed and became a final judgment in April of 1968.

On July 12, 1968, the Trial Judge-by-Designation filed in this case (i.e., Grace v. Hargadine) a Certificate under F.R.Cr.P. 42 and specifically paragraph (a). The Certificate contained a memorandum of the facts claimed to constitute the contempt as required by the rule. The certification was, of course, that the facts set forth in the memorandum constitute a contempt. The Trial Judge-by-Designation "awaited the filing of the certificate until a substantial judgment returned for the Plaintiff had been affirmed on appeal and further proceedings herein have been obviated by the satisfying of such judgment by the Defendants". The trial counsel for the Plaintiff Grace was the individual certified as having committed the contempt during the described trial. The certification concluded as follows--

> "(The Designated Trial Judge) is not advised whether (trial counsel for Plaintiff) should receive a reprimand, be otherwise punished, or have his conduct go unnoticed. Therefore (The Designated Trial Judge) (does) disqualify (himself) from such a consideration and directs the clerk to invite the attention of the Chief Judge of the Southern District of Ohio to the filing of this Memorandum and Certificate".

We observe that the filing of July 12, 1968, was not a final or appealable order, nor has it ever become so. The proposition that a contempt certification under Rule 42(a) is not final -- short of an interim abuse of discretion and none such is involved here -- until the "summar(il)y punishment" is determined and reduced to judgment (Cf. Cr. Rul. 32 and Civ. Rul. 54-a) needs no citation of case authority.

From 1968 to this date, as the docket in this case demonstrates, no action has been taken on the Memorandum and Certification by this Court or any Judge thereof.

We deal in this memorandum solely with a procedural matter and dispose of the certification on the procedural ground only. It is consequently not necessary for the Court to reach the question of whether the facts set forth as such in the Memorandum and Certification of July 12, 1968 constitute a "contempt" as a matter of law and that question is not decided by this Court.[1]

A lot of water has gone over all of the dams, including the legal ones, since 1968. As of 1968 -- whatever the law may have been elsewhere and whatever the law may be today -- it is clear that the Judge-by-Designation had the "discretion" to delay a Rule 42(a) certification until "after the trial was completed and the judgment was final." The Sicth Circuit specifically so held in 1965 in United States v. Schiffer, 351 F.2d 91 (in affirming such an exercise of discretion by Chief Judge Frank Wilson of the Eastern District of Tennessee).

Since 1968 the Supreme Court has on several occasions dealt with the subject of whether a Trial Judge may validly make a "delayed" certification of contempt. See Johnson v. Mississippi, 403 U.S. 212 (1971) and Taylor v. Hayes, 418 U.S. 897 (1974) and Groppi v. Leslie, 404 U.S. 496 (1972). Cf. United States v. Wilson, ___ U.S. ____, 44 L.Ed.2d 186 (1975). A reading of the dissent in the Wilson case will sufficiently demonstrate that over the past five or six years the procedural law of contempt as applied to a claimed contempt taking place during a trial and a delayed certification by the Trial Judge has been in flux and it would probably be fair to conclude that the law is not the same today as it was in 1968. For an excellent demonstration of the point see In Re Dellinger, 461 F.2d 387 (1972)(7th) at pages 392, et seq. Also cf. United States v. Combs, 390 F.2d 426, a Sixth Circuit case decided in 1968.

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[1] Nor could it be. One member of this court adheres to the view that the answer should be affirmative. The other member is of the view that the conduct involved was and is within the bounds of the "great latitude in the area of vigorous advocacy" rule of the McConnell case.

It is our conclusion that under the present law and under all of the circumstances described in the Memorandum and Certification of July 12, 1968, the certification of "contempt" is procedurally defective for the reason that under the present law and the described circumstances the finding and conclusion of contempt implicit in a 42-a certification could validly be determined only by a judge other than the Trial Judge.

Any final (so far as this proceeding is concerned) action of this Court at this time in response to the reference and invitation in the concluding paragraph of the Certification (see ante) must satisfy the procedural due process requirements of the present law. There is, therefore, no valid alternate to the course we take.

The Certification of July 12, 1968, should be vacated. A judgment in accord herewith is being entered this date.

United States District Judge

Neese, J., Concurring:-

NEESE, J. (by designation and assignment) concurring in the result.

Having heretofore disqualified myself from participating in the consideration of my certificate of July 12, 1968 herein, I express no view as to the rationale of Chief Judge Hogan's reasoning in vacating it on procedural grounds. Apart from that, I concur in the result which his decision produces.

I anticipated when I filed such certificate that in due course counsel for the plaintiff would either be dealt with in a penal manner for his conduct or excused from it in some affirmative manner. No action was taken one way or another for years, leaving outstanding in the records of this Court and unresolved the factual averments contained in my certificate. I considered this result unfair to Mr. Keeler, Esq. As this condition of the record has maintained for more than seven years, I have joined with Chief Judge Hogan in signing the judgment, vacating my certificate.

FILED
JOHN D. LYTER, CLERK
JAN 28 10 11 AM '75
U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
WEST DIV. CINCINNATI

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION

W. R. GRACE & COMPANY,]
]
Plaintiff]
]
v.] Civil Action No. 5723
]
CLYDE C. HARGADINE, et al,]
]
Defendants]

JUDGMENT

The certification filed in this cause July 12, 1968 is hereby vacated.

C. G. NEESE, U. S. District Judge
by designation and assignment

TIMOTHY S. HOGAN, U. S. District Judge

[illegible], President
[illegible] LOCK, President-elect
RAYMOND H. KINSLEY, First Vice President
C. ROBERT BEIRNE, Second Vice President
ROBERT B. LAVERCOMBE, Third Vice President
ALBERT B. FINGERMAN, Treasurer
ROBERT M. DENNIS, Secretary
ROBERT L. DAVIS, Members at Large
BRUCE B. McINTOSH
MILTON M. BLOOM, Past President

CINCINNATI BAR ASSOCIATION

Organized Feb. 27, 1872

MARTHA HILDENBRAND PERIN
EXECUTIVE DIRECTOR

125 EAST NINTH STREET
CINCINNATI, OHIO 45202
PHONE [illegible]

January 21, 1970

The Executive Committee
Cincinnati Bar Association
125 East Ninth Street
Cincinnati, Ohio 45202

Re: Robert T. Keeler

Gentlemen:

The Grievance Committee this date adopted a resolution directing the writer, as Chairman of the Committee, to forward to the Executive Committee the attached report of its investigation of the matter of a filing of Memorandum and Certification by the Honorable C. G. Neese of Greenville, Tennseess, sitting by designation in the U. S. District Court for the Southern District of Ohio, involving the case of the W. R. Grace Company vs. Clyde C. Hargadine, et al.

You will note that it was the finding of the subcommittee, which was adopted by the full Committee, that there was no misconduct on the part of Mr. Keeler under Rule XVIII of the Rules of Practice of the Supreme Court of Ohio. It is accordingly suggested that the report be received by the Executive Committee for information and filing and no further action be taken except perhaps that a copy of the report be forwarded to Mr. C. R. Beirne acting at the present time as counsel for Mr. Keeler.

Very truly yours,

CINCINNATI BAR ASSOCIATION

By Robert M. Dennis
Robert M. Dennis, Chairman,
Grievance Committee

RMD/jd
Enc.

EXHIBIT B

PAUL W. STEER, President
JOHN R. BULLOCK, President-elect
RAYMOND H. HENSLEY, First Vice President
C. ROBERT BEIRNE, Second Vice President
ROBERT R. LAVERCOMBE, Third Vice President
ALBERT R. FINGERMAN, Treasurer
ROBERT M. DENNIS, Secretary
ROBERT L. DAVIS, Members at Large
BRUCE B. McINTOSH
MILTON M. BLOOM, Past President

CINCINNATI BAR ASSOCIATION

Organized Feb. 27, 1872

MARTHA HILDENBRAND PERIN
EXECUTIVE DIRECTOR

125 EAST NINTH STREET
CINCINNATI, OHIO 45202
PHONE [illegible]

November 11, 1969

Grievance Committee
Cincinnati Bar Association
125 East Ninth Street
Cincinnati, Ohio 45202

Re: Investigation of filing of Memorandum and Certification filed in Civil Action 5723 on the dockets of the U. S. District Court for the Southern District of Ohio, styled "W. R. Grace Company vs. Clyde C. Hargadine, et al.

Gentlemen:

The following represents a report of the subcommittee appointed by the Chairman to investigate the matter of the filing by the Honorable C. G. Neese, Greenville, Tennessee, sitting by designation in the U. S. District Court for the Southern District of Ohio, involving the case of the W. R. Grace Company vs. Clyde C. Hargandine, et al. The memorandum and certification received great notoriety in the Cincinnati newspapers, being carried as a headline item in both papers. The Cincinnati Enquirer publicly summarized the memorandum as follows:

> "Cincinnati Attorney Robert T. Keeler has been charged by a Federal Judge with obstructionism, stalling tactics, failure to obey court orders and contemptuous acts during a trial in which he was chief counsel for the plaintiff."

We, as a Bar Association, are interested in the discipline of our own members and act not only on complaints that are filed with us but on incidents that come to our attention involving lawyers whose conduct has been questioned.

The trial of the case took almost two months, which would mean approximately 40 days of trial. It involved about 5,000 exhibits.

There are three principal categories of conduct complained of:

1. The memorandum recites that on several occasions the attorney failed to have a witness ready for presentation; that on one occasion one-half hour's time was lost and on another occasion 15 minutes.

2. That an order or understanding had been reached on pre-trial, as to which there were varying interpretations, that some 5,000 exhibits would be inspected by counsel, and initialed and presented to the Court in advance of use; that subsequently Mr. Keeler had not complied with this understanding. Mr. Keeler's interpretation of the limitations imposed by this understanding appears to vary from that of the Court.

3. That counsel engaged in delaying tactics and marking time during the course of the trial.

The Cincinnati Bar Association is deeply concerned with the prompt dispatch of the work of the Courts, Federal and State. The Association is composed of working lawyers, many of whom are the trial lawyers waiting to get the Court's attention as soon as a particular case in progress is concluded. The advent of the Federal Rules of Civil Procedure and other developments toward greater cooperation of the Bar and the Bench to speed the judicial process has been welcomed.

At the same time, the Association is concerned that in speeding up trials the fearless independence of the lawyer in presenting the case for his client is not lost. Surely no one in this country wants our lawyers to become the subservient puppets they appear to be in some countries less free than ours.

Canon 15 of the Canons of Professional Ethics has this to say in connection with how far a lawyer may go in supporting a client's cause:

> "... .The lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,' to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. . ."

In the matter at bar we are troubled about the standards (or lack of them) applicable in determining "obstructionism," "stalling tactics" and the like which largely form the substance of the charges here.

We think it one of the glories of our bar that lawyers are individualists and not cast from the same mold. Some are quick witted; some think and speak slowly and deliberately; some move ponderously, others with a hurried rush. Slowness by a quick-witted person might by "stalling" when the same time by a slower thinking brother of the bar would be natural action. Without a well-defined standard, it is almost impossible for one reviewing a record to be able to reach a correct conclusion. Are we then to say that whenever any judge states that the lawyer was "stalling" that statement must be accepted as the complete fact?

Unquestionably the trial judge must have great leeway in the control of the trial so that it progresses steadily, but we are not prepared t think that this goes so far as to require the imposition of discipline censure or punishment - because a particular judge believes and says that a particular lawyer was "stalling" or guility of "obstructionism.

Censure or discipline is normally unnecessary for stalling or obstructionism usually imposes its own penalty. Juries are capable of judging one who stalls and obstructs the course of justice and are quick to resent it so that both the lawyer and his client suffer thereby. We suggest that the discipline that will surely come to a lawyer subtly in the hands of the Court and the jury when he engages in stalling and obstructionist tactics is an adequate discipline which, to be effective, does not require the additional imposition of censure or punishment either during the heat of the trial or afterwards when the reviewer cannot possibly obtain a correct picture from a reading o a cold record.

The Association is also concerned with the discipline threatened against the client because of what the Court regarded as stalling by the lawyer. It appears that the order of the Court for all witnesses to be returned and be sequestered throughout the trial was a virtually impossible situation to be complied with.

As working trial lawyers the Association is also concerned with the imposition of discipline on a lawyer because he "wasted" one-half hour, 15 minutes, and other time on several occasions by not having a witness ready to go on the stand. No lawyer at our Bar has the ability of foreseeing the future nor of foretelling how long his opponent will cross-examine. Unquestionably lawyers can and should make every effort to schedule witnesses so that there should be no gap unnecessarily. But a failure to do so on three or four occasic in a trial lasting nearly two months indicates to this Committee of our Association that there was exceptionally good cooperation by the lawyers since witnesses were always ready to testify except on the three or four occasions complained of.

Finally, we are concerned with the threat of discipline because in several instances out of some 5,000 exhibits the lawyer failed to comply with some understanding the way the judge understood it, or because the lawyer erroneously thought he had complied and found he had not. In a trial involving five or ten exhibits such an oversight might be inexcusable, but in a trial involving some 5,000 exhibits some leeway must be granted for failure of recollection or misunderstanding in a few instances.

The yardstick by which Mr. Keeler's conduct must be judged is set out in 18 U. S. C. Section 401 and the cases construing it. That section, so far as it is applicable to any attorney in trial, reads as follows:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as - -
> (1) misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice."

The inquiry, then is in what way did Mr. Keeler obstruct justice. As to the listing of witnesses of which the Court complains, Mr. Keeler did not refuse to obey an order of the Court. Both he and the Trial Court assumed there was no rule in effect requiring what the Court suggested. Mr. Keeler said in the absence of such rule he was not required to list witnesses and the general nature of their testimony, but that he would do so on order of the Court. Thereafter, without any order of the Court, he complied with the Court's request. There is no suggestion that his refusal was inspired by malevolence toward his opponent or ill will toward the Court. The only reason remaining, and the apparent reason, was his desire to protect his client's rights.

In the case of In Re McConnell, 370 U.S. 230, the Supreme Court in passing upon an attorney's statements in open court in an endeavor to protect his client's rights, says in the syllabus:

> "Under 18 U. S. C. Section 401 and Federal Rule of Criminal Procedure 42(a), petitioner was summarily tried and convicted by the trial judge of criminal contempt for conduct during a trial in which petitioner represented the plaintiff in a suit under the Clayton Act for treble damages for an alleged conspiracy to destroy the plaintiff's business by restraining and monopolizing trade. At the very outset of the trial, the judge had ruled erroneously that the plaintiff's counsel could not try to prove the conspiracy charge; but, in order to comply with Federal Rule of Civil Procedure 43(c) and thus preserve his client's rights on appeal, petitioner in the presence of the jury persisted in asking questions intended to lay the proper foundation for offers of proof of conspiracy. The

> judge ordered petitioner to stop doing so; but petitioner insisted that he had a right to do so and said he would continue to do so 'unless some bailiff stops us.' However, a recess was then called and thereafter petitioner asked no more of the forbidden questions. Held: There was nothing in this conduct sufficiently disruptive of the trial court's business to 'obstruct the administration of justice,' within the meaning of 18 U. S. C. Section 401, and a judgment sustaining the conviction is reversed."

In the body of the opinion the court quotes with approval from Ex parte Hudgings, 249 U.S. 378, 383, as follows:

> "An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted - - -."

The delay occasioned by running out of witnesses appears to be a matter of very little time lost. It is difficult for anyone engaged in trial practice to see how an attorney can so prepare a case that will run two months, attempting as he must to line up his witnesses in chronological or orderly sequence, might not be confronted with the same difficulty. It is unquestionably desirable to have witnesses present and to lose no time in the trial of a cause, but there is probably no trial attorney who has not been confronted with the same embarrassment at some time or other and without the least desire to impede the court.

As to the dismissal of witnesses, it is customary hereabouts for the court after examination and cross-examination have been completed to say to both counsel "Have you any further need for this witness?" On receiving a negative answer, the court excuses the witness. On occasion the court does overlook such an inquiry. If a recess were called or a day ended shortly after the witness had finished his testimony, few lawyers would want to require the witness to return the following day simply for the court's excusal. Counsel could of course go to the court in chambers but so few courts would take exception to counsel saying to the witness that his testimony had been given and he was done, that there does not seem to be a pressing necessity to interfere with the court in chambers for such an excusal.

Mr. Keeler being familiar with trial matters was aware of the practice that when an objection is made and overruled and the evidence is admitted, a rule has thereby been established so that it is no longer necessary to continue to object to the same class or kind of evidence. But if there is a deviation, even a slight one, from a particular kind or class of evidence, a careful attorney would assure himself that he had a continuing objection.

The courts generally do not expect absolute perfection from a lawyer and recognize that the lawyer is carrying somewhat more of a burden in properly presenting the case that the court is in listening to it. In a somehwat analogous case, that of Gamble v. Pope and Talbot, Inc., 307 R.2d 729, where an attorney inadvertently departed from a pretrial instruction or ruling of the court, the Court of Appeals said,

> "On occasion there is a slip up. Almost always it is no more than that, as in the involved instance. Usually it occurs where a date is not entered, or perhaps not carried over, or is erroneously noted; sometimes where a paper or letter is filed prematurely and forgotten until some independent reminder

> brings it to light. Judges are not customarily plauged with that sort of incident themselves though it has taken place with them too. Lawyers are not so fortunate. When it happens, they are embarrassed and troubled. In good faith they do what can be done to make amends. As long as a lawyer practices, once in a great while, he will be haunted by the thought that he missed a filing date. His primary distress is not over punishment but that he has neglected a duty. No matter what might be the office situation, the responsibility is his and he assumes it."

The same court further said that it was necessary that a lawyer have some independence in order to present his client's case aright. The court's words are these:

> "What the minority view really attacks is our 'vigorous, independent bar.' What it really advocates is the complete take over of the trial and its collaterals by the trial judge and appellate courts. It is good to have this out in the open where it can be squarely faced. The effort ot concentrate all that frightening power in the bench is too dangerous a potential to let slip by clothed in such disarming language as 'simply * * * an exercise in disciplinary authority, with no necessary criminal connotation.' All that 'exercise' happens to be is the first giant step in stripping a lawyer of his independence and leaving him, his client and the latter's cause of action to the ukase of the Court. Even Jack Cade's solution would have left the lawyer his self-respect."

We, therefore, find that the several delays in a case of this magnitude, a misunderstanding or two concerning some 5,000 exhibit and the desire to be sure that one has a continuing objection are matters constituting misconduct under Rule XVIII of the Rules of Practice of the Supreme Court of Ohio.

Respectfully submitted,

CINCINNATI BAR ASSOCIATION

By________________________
Thomas C. Spraul

By________________________
Joseph E. Rosen

By________________________
Robert H. French, Chairman,
Subcommittee

RMD/bjg

O'MELVENY & MYERS
1800 M STREET, N. W.
WASHINGTON, D. C. 20036-5857
TELEPHONE (202) 457-5300
TELEX 89-622

400 SOUTH HOPE STREET
LOS ANGELES, CALIFORNIA 90071-2899
TELEPHONE (213) 669-6000
TELEX 67-4122 · 4997795 (ITT)

1800 CENTURY PARK EAST
LOS ANGELES, CALIFORNIA 90067-1589
TELEPHONE (213) 553-6700
TELEX 67-4097

SUITE 1700
610 NEWPORT CENTER DRIVE
NEWPORT BEACH, CALIFORNIA 92660-6429
TELEPHONE (714) 760-9600 · (213) 669-6000
TELEX (714) 720-1307 (DDD) · 4722066 (ITT)

4 PLACE DE LA CONCORDE
PARIS 8^e, FRANCE
TELEPHONE 265 39-33
TELEX 642-660716

OUR FILE NUMBER

WRITER'S DIRECT TELEPHONE
(202) 457-5325

November
23rd
1983

Honorable Strom Thurmond
Chairman
Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

As you know, when Mr. Unger presented his testimony on October 27, 1983, he had not made it available to the American Bar Association prior to the date of the hearing. I am enclosing herewith a supplemental statement which deals with some of the issues raised by Mr. Unger.

Sincerely,

William T. Coleman, Jr.

Enclosure

cc: Edward C. Schmults
Jonathan C. Rose
Sherman E. Unger
Robert J. Short

ADDITIONAL SUPPLEMENTAL STATEMENT OF

WILLIAM T. COLEMAN, JR. ON BEHALF OF
THE AMERICAN BAR ASSOCIATION

BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NOMINATION OF SHERMAN EDWARD UNGER AS
UNITED STATES CIRCUIT JUDGE FOR THE
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NOVEMBER 23, 1983

The purpose of this additional statement is to respond briefly to certain allegations made by Mr. Unger in his October 27, 1983 testimony concerning the investigation conducted on behalf of the American Bar Association and to refer the Senate Judiciary Committee to documents and testimony in the record which contradict or refute statements made in Mr. Unger's October 27, 1983 testimony concerning the charges against him. This additional statement is necessary because Mr. Unger did not provide the ABA a copy of his Supplemental Statement before the start of the October 27, 1983 hearing.* Consequently, we were unable to respond at that time to some assertions in his testimony.

I. ALLEGATIONS AGAINST THE ABA.

In his prepared testimony of October 27, 1983, Mr. Unger suggests that the testimony submitted on behalf of the ABA fails to comply with Ethical Consideration 8-6 of the ABA Model Code of Professional Responsibility. Mr. Unger sets forth the language of EC 8-6, emphasizing that a lawyer "should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms. . . . Criticisms motivated by reasons other than a desire to improve the legal system are not justified." See Supplemental Statement of Sherman E. Unger, Preface, Exhibit A.*

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* Indeed, we were only able to obtain a copy of his Supplemental Statement from a third person just before we were called upon to testify.

The ABA has endeavored to discharge precisely the reponsibilities placed upon it by EC 8-6. That provision emphasizes that judges "ought to be persons of integrity, competence, and suitable temperament." It also states that lawyers "have a special responsibility to aid in the selection of only those who are qualified. . . . Lawyers should protest earnestly against the appointment or election of those who are unsuited for the bench and strive to have elected or appointed thereto only those who are willing to forego pursuits, whether of a business, political, or other nature, that may interfere with the free and fair consideration of questions presented for adjudication." The testimony submitted on behalf of the ABA reflects a consistent effort to fulfill those obligations.*

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* This language emphasized by Mr. Unger is inapposite because it concerns complaints directed at "adjudicatory officials," both judges and administrative officials, not criticisms concerning judicial nominees.

Mr. Unger has also emphasized the language of Disciplinary Rule 1-103(A). See Supp. Statement of Sherman E. Unger, Preface, Exhibit B. Mr. Unger has provided no support for the implication that the ABA has violated this provision. DR-1-103(A), moreover, is not in effect in the District of Columbia.

The specific allegations raised by the ABA are entirely consistent with the dictates of EC 8-6. Far from being petty, those allegations raise serious concerns about Mr. Unger's fitness to be a judge. It bears repeating that the ABA included in its testimony only those allegations for which it had some documentary or other non-confidential support. Numerous allegations that lacked such support were not relied upon by the ABA, even where the attorneys making the allegations insisted that they were true and that they raised the gravest questions about Mr. Unger's suitability for public office.* The ABA's criticisms of Mr. Unger are motivated solely by our interest in preserving the high quality and integrity of our federal judicial system. Those criticisms are painful to make and provide no benefit to those who have been responsible for delivering them other than the knowledge that their efforts were to serve the public interest.**

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* Mr. Unger suggested in his oral testimony on October 27, 1983 that Brooksley Born and I had harrassed him or treated him unfairly during our interviews with him. As described in the initial ABA testimony, we met with Mr. Unger five times for the specific purpose of informing him of the allegations that had been raised against him and providing him an opportunity to respond to them. While it may be unpleasant for one to hear such allegations, it was our obligation to present those allegations to Mr. Unger and to allow him an opportunity to respond. When Mr. Unger denied or adequately explained an allegation, or when we found no non-confidential evidence supporting an allegation, we did not rely on it in reaching our conclusions about Mr. Unger's qualifications. We understandably asked Mr. Unger to reexplain positions he had taken when we received documentary or other evidence contradicting those positions. Mr. Unger changed his response to several allegations during the ABA's investigation, as he did during the course of these confirmation hearings.

Contrary to Mr. Unger's testimony on October 27, 1983, at no time did Ms. Born ask Mr. Unger "Were you not part of the Nixon Administration," Tr., Oct. 27, 1983 (unedited) pp. 181-82, a background fact which was clearly revealed in his response to the Personal Data Questionnaire. At no time did I ever say to Mr. Unger that "I was sent by the Department of Justice . . . to protect the President of the United States from [Mr. Unger]." Id. at 182.

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* As noted above, the ABA also did not pursue allegations when Mr. Unger provided an adequate explanation. As you will recall, for example, the ABA dropped an allegation concerning impropriety on Mr. Unger's 1968 federal tax return because we believed the allegation was inconsequential in light of Mr. Unger's explanation. It was only during the confirmation hearings that we learned that Mr. Unger had neglected to mention to us that he had also failed to report $40,000 of income on that same tax return, and he paid much more than $3,100 in additional taxes over what he said he owed when he filed the original 1968 federal tax return.

** The high standards the legal profession sets for judges and lawyers are, we believe, standards that the public demands and deserves. As one commentator has noted:

> We may sometimes resent the fact that the public is pointing to the lawyers and holding us responsible for many of the moral shortcomings of the country, but there is no way that the legal profession can avoid bearing this burden. We play too crucial a role in government and corporate life to avoid this responsibility. . . .

(Footnote cont'd on next page)

II. EX PARTE CONTACTS.

In several important respects, Mr. Unger has misstated the record in his most recent response to the allegation that he engaged in improper ex parte contacts, which he views as "[t]he most serious charge made to the Committee. . . ." Supp. Statement of Sherman E. Unger, Part I, p. 1.

1. Mr. Unger still states that "[t]he evidence put before this Committee involves only a single _ex parte_ contact between me and a judge hearing a case in which I was counsel." _Id._, p. 3. The record, however, contains evidence of several, separate ex parte communications by Mr. Unger.

- In his most recent statement, dated October 27, 1983, Mr. Unger has made it clear that he had at least two separate ex parte meetings with Judge

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(Footnote cont'd from previous page)

> It is our burden and our glory that we are expected to live by a high professional standard and earn a living at the same time. We do not have the luxury of the clergy who can live in the temple and condemn the market place. We have to carry the standards of the temple into the market place and practice our trade there.

Redlich, _Lawyers, the Temple and the Market Place_, 30 Bus. Law. 65 (Special Issue) (1975). _quoted in_ Creedon, _Lawyer and Executive -- The Role of the General Counsel_, 39 Bus. Law. 25, 25-26 (1983).

Gartner in July 1977, in which he discussed the possibility of Judge Gartner's reversing a previous order denying consolidation of the Unit, Inc. and Freidco bankruptcy proceedings. See id., pp. 7-8.*

- Mr. Robert T. Keeler alleged that in June 1966 Mr. Unger obtained an ex parte order from a judge allowing him to take a deposition the following day in Los Angeles, California. See ABA Statement, Sept. 29, 1983, p. 32 n.*; Letter of Robert T. Keeler to the Honorable Strom Thurmond, dated Sept. 22, 1983, pp. 1-2.**

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* At the second of these meetings, Mr. Unger submitted to Judge Gartner on an ex parte basis an application, memorandum of law, and, subsequently, a proposed order, without providing notice to opposing counsel and without ever providing them copies of these documents. See id., pp. 7-8. His failure to serve his opponents with copies of those papers is itself a breach of ethics. See D-7-110(B)(2), Supp. Statement of Sherman E. Unger, Part B, Exhibit 13.

** Mr. Unger has attacked the credibility of Mr. Keeler's allegation on the ground that the federal judge in the same case filed a Memorandum and Certification which was highly critical of Mr. Keeler's conduct. See Supp. Statement of Sherman E. Unger, Part III, p. 2 and Exhibit 19; see also Tr., Oct. 5, 1983 (unedited), pp. 19-20, 134; Tr., Oct. 27, 1983 (unedited), p. 180. As explained in Mr. Keeler's letter of October 25, 1983 to the Honorable Strom Thurmond, the judge's charges against Mr. Keeler ultimately were vacated by order of the federal court in Cincinnati. After inquiring into the judge's charges, the Grievance Committee of the Cincinnati Bar Association found no misconduct on Mr. Keeler's part. The charges by this judge have no bearing on the allegation that Mr. Unger obtained the ex parte order concerning the deposition, which Mr. Unger has never denied. While Mr. Unger testified that he had no recollection of this incident, Tr., Oct. 5, 1983 (unedited), pp. 133-34, Mr. Keeler notes that Mr. Unger actually traveled to Los Angeles for the deposition, and thereafter sought to dismiss the action against Mr. Keeler's clients or to have them found in contempt for failure to respond to the ex parte order he had obtained. Letter of Robert T. Keeler to the Honorable Strom Thurmond, dated Oct. 25, 1983, p. 2.

- In the course of a hearing in the Scioto Park proceeding on July 20, 1977, Mr. Unger requested a private meeting with Judge Gartner on matters concerning the Unit, Inc. and Freidco cases. Jay Rosenberg, who was present in the court, was not privy to this conversation, although he was counsel for a creditor in both the Scioto Park and the Unit, Inc. proceedings. See ABA Statement, Sept. 29, 1983, p. 23 n.*.*

- Mr. Leon S. Forman, an attorney from Philadelphia, Pennsylvania, submitted a sworn affidavit to the Senate Judiciary Committee dated Sept. 27, 1983, in which he alleged that Mr. Unger engaged in ex parte contacts with Judge Gartner during the Scioto Park bankruptcy litigation. See ABA Supp. Statement, Exhibit D.

- Morris M. Berger and Michael Hahalyak, both attorneys from Pittsburgh, Pennsylvania, testified that Mr. Unger had obtained a conditional order from Judge Gartner directing Unit, Inc. to proceed with the sale of property of a limited partnership called B & B Properties without notice to the limited partners.**

2. There was some dispute during the October 27, 1983 hearing about whether Mr. Unger had raised the issue of Judge Gartner's vacating his previous order denying consolidation of the Unit, Inc. and Freidco proceedings. See Tr., Oct. 27, 1983 (unedited), pp. 89-94. As I pointed out during my

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* Although this perhaps was not made clear during my oral testimony on October 27, 1983, the ex parte nature of this off-the-record conversation stems in part from the fact that the opposing counsel, Mr. Rosenberg, was also an opposing counsel in the Unit, Inc. case.

** This allegation is discussed in more detail below.

testimony, there is abundant evidence that Mr. Unger raised this issue:

- Judge Gartner testified that Mr. Unger had raised the issue. See ABA Statement, Exhibit 11, pp. 13, 46.
- Mr. Unger himself, in his brief to the Third Circuit, said that he had raised this issue. See ABA Statement, Exhibit 17, p. 9.
- Justice Moore, Mr. Unger's co-counsel in the case, testified that Mr. Unger made it clear that he had raised the issue with Judge Gartner. See Tr., Oct. 5, 1983 (unedited), pp. 143, 146.
- Mr. Unger himself indicated in his testimony that he had suggested to the judge the possibility of overruling his earlier order. See Tr., Oct. 5, 1983 (unedited), p. 169; Tr., Oct. 6, 1983 (unedited), p. 30.

3. Mr. Unger has persisted in suggesting that one of his opposing counsel in Unit, Inc., Jay Rosenberg, improperly provided Judge Gartner, on an ex parte basis, with a copy of the opinion of Judge Balick appointing a trustee in Freidco, and that this improper action precipitated the ex parte meetings between Judge Gartner and Mr. Unger that followed. See Supp. Statement of Sherman E. Unger, Part I, pp. 4-5; Statement of Sherman E. Unger, Sept. 29, 1983, pp. 4-5.
Mr. Rosenberg's cover letter submitting the opinion to Judge Gartner, however, indicates that copies were sent to both Sherman E. Unger, and his co-counsel, J. Vincent Aug. See

ABA Statement, Exhibit 18.* Mr. Rosenberg's action thus was not ex parte and in any event certainly cannot justify the action Mr. Unger subsequently sought from Judge Gartner on an ex parte basis.

4. In his written statement Mr. Unger reasserts his earlier position that "[t]he matter we [Judge Gartner and Mr. Unger] were discussing was related to procedure and the administration of an estate in Chapter XI before Judge Gartner." Supp. Statement of Sherman E. Unger, Part I, p. 11.** As described in the ABA Supplemental Statement of Oct. 27, 1983, the record refutes the contention that Mr. Unger's discussions with Judge Gartner and the papers he filed did not involve contested matters or were not intended to have substantive effect.

- o – The Third Circuit explicitly rejected Mr. Unger's contention that the ex parte meetings were proper because they involved matters of administration. See ABA Statement, Exhibit 13, pp. 11-14, 30-34.

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* Bonita Buerk, Judge Gartner's secretary, testified that Mr. Rosenberg brought the opinion to the Judge's chambers but did not go in to see the Judge. Tr., Oct. 27, 1983 (unedited), p. 78.

** In his oral testimony, Mr. Unger also appeared to draw a distinction between filing a procedural motion for reconsideration of Judge Gartner's previous order and taking the substantive action of actually seeking consolidation of the _Unit, Inc._ and _Freidco_ proceedings. _See_ Tr., Oct. 27, 1983 (unedited), pp. 96-100, 172.

- Mr. Unger conceded in his testimony that substantive, as opposed to administrative, matters were addressed in the meetings with Judge Gartner and in his ex parte written submissions to Judge Gartner. See Tr., Oct. 5, 1983 (unedited), pp. 122-29, 169; Tr., Oct. 6, 1983 (unedited), pp. 45-46; ABA Supp. Statement, pp. 11-12.
- Mr. Unger's efforts to obtain Judge Gartner's July 14, 1977 ex parte order were not "procedural" simply because they involved an application for reconsideration; that order vacated a previous ruling that had been hotly contested and litigated by the affected parties. See ABA Supp. Statement, p. 9.
- Mr. Unger's efforts to obtain that ex parte order were directly related to the appointment of a trustee in Freidco, which also was a substantive, litigated issue in the Freidco proceeding. During his ex parte meeting with Judge Gartner, Judge Gartner told Mr. Unger that he would "take a second look" at whether a trustee should have been appointed in Freidco if he took jurisdiction over that case. See ABA Supp. Statement, pp. 9-10.
- Mr. Unger clearly intended Judge Gartner's July 14, 1977 ex parte order to have substantive legal effect in the Freidco proceeding, and he subsequently argued that the order had the effect of staying bankruptcy Judge Balick's jurisdiction over the Freidco matter. See ABA Supp. Statement, p. 10. See also Tr., Oct. 5, 1983 (unedited), pp. 143, 146 (testimony of Justice Moore).

III. MR. UNGER'S 1968 FEDERAL INCOME TAX RETURN.

Mr. Unger states that "It is for this Committee to determine whether the payment of a single negligence penalty in over 30 years of paying Federal income taxes is sufficient to bar my confirmation." Supp. Statement of Sherman E. Unger, Part II, p. 4. That is not, however, an accurate statement of the issue. The broader and more significant issues before this Committee are (1) whether there is any justifiable explanation for Mr. Unger's failure to report $40,000 of income, which he received in June 1968, on his original 1968 tax return and (2) whether Mr. Unger was forthright in his responses to inquiries by the ABA Committee concerning his 1968 federal tax return.

As to the first issue, Mr. Unger has given conflicting testimony on the nature of the $40,000 payment he received,* what he did with the payment upon receiving it,** when he discovered that he had failed to report this income on his tax return,*** and why he might have overlooked so large a

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* Mr. Unger described it both as a legal fee and as a sale of rights. See ABA Supp. Statement, p. 18. Mr. Unger has not contended that the payment was not taxable income.

** Mr. Unger first testified that he immediately signed a $40,000 check to him over to a corporation for stock and thus did not record the check in his checking account. He later testified that he deposited two $20,000 checks in his checking account and then wrote a check for $30,000 to purchase a one-third interest in the corporation's stock. Id.

*** In his testimony on September 30, 1983, Mr. Unger testified that he amended his tax return to declare the $40,000 as income after the issue had been raised in an IRS audit, see ABA Supp. Statement, p. 18. (He apparently offered a similar explanation in a letter to Senator Thurmond dated August 10, 1983.) Mr. Unger subsequently testified on

(Footnote cont'd to next page)

payment in reporting his taxable income for 1968. See ABA Supp. Statement, pp. 17-20. Ultimately, Mr. Unger testified that "[t]here is no way for me to explain how I forgot that payment." Tr., Oct. 27, 1983 (unedited), p. 177. It strains credulity that Mr. Unger simply overlooked a $40,000 payment which involved a major business deal* and which was received

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(Footnote cont'd from previous page)

October 5, 1983 that he discovered his oversight and amended his return prior to the beginning of the IRS audit. See id. at 18-19. Mr. Unger also admitted in his testimony of October 5, 1983 that, before he filed an amended return, he received a notice from the tax auditor stating that his 1968 tax return was going to be audited. See id., p. 20. Mr. Unger simply ignores this admission in his prepared statement of Oct. 27, 1983. (A January 13, 1972 IRS Report states that the IRS discovered the unreported $40,000 when it was examining the returns of certain corporate taxpayers. See ABA Supp. Statement, Exhibit F, p. 1.)

Mr. Unger still relies upon the affidavit of Paul Eggers, then General Counsel of the Department of Treasury, to show that, on his own initiative, he notified the IRS of his failure to report the $40,000 as income. As noted before, Mr. Eggers' affidavit simply does not indicate that Mr. Unger made a formal or complete disclosure to the IRS on this matter. See ABA Supp. Statement, pp. 20-21, and Exhibits G and H thereto.

Similarly, Mr. Unger still states that he reported this income on his amended return despite the suggestion of his tax counsel that it arguably was not taxable income. See Tr., Oct. 27, 1983 (unedited) pp. 177-78. As noted before, this statement misrepresents the actual conclusions in the letter from his tax counsel. See ABA Supp. Statement, p. 21, n.*.

* Mr. Unger testified that the transaction in which he received the $40,000 "was an unusual transaction, the first of that kind in my life." Tr. Oct. 27, 1983 (unedited), p. 186.

in a year in which he reported a total gross income of only $64,269.02 on his original tax return. Moreover, it is clear that Mr. Unger was aware of the Motion Talking Picture Services Company (the company in connection with which he received the $40.000) when he prepared his original 1968 tax return. On that return he reported $1,260 income in gross dividends from Motion Talking Picture Services and $3,625 of "miscellaneous income," described as "Board for Motion Talking Pictures" and "Directors' fee -- Modern Media."

As to the second issue, Mr. Unger argues that the questions that the ABA asked him about his 1968 tax return did not specifically call for information concerning his failure to report the $40,000. The evidence shows that Mr. Unger was hardly forthright or forthcoming in neglecting to mention this issue when asked about his 1968 tax return. On the contrary, he gave the distinct impression that his dispute with the IRS concerning his 1968 return was settled for approximately $3,000, when in fact he had paid over $20,000 in additional taxes, interest and penalties on that return in connection with the unreported $40,000 of income.

IV. THE ALLEGATIONS OF MORRIS M. BERGER AND MICHAEL HAHALYAK.

Morris M. Berger and Michael Hahalyak, attorneys from Pittsburgh, Pennsylvania, testified on October 27, 1983 that Mr. Unger had improperly obtained from Judge Gartner an order directing Unit, Inc. to proceed with the sale of the property owned by a limited partnership called B & B Properties. Unit, Inc. was the general partner and owned a 12-1/2% interest in B & B Properties; Mr. Berger and Mr. Hahalyak were two of the limited partners in B & B Properties. The principal points of contention on this issue are laid out in the testimony of Mr. Berger and Mr. Hahalyak, the response of Mr. Unger, and the sworn rebuttal statement of Mr. Berger and Mr. Hahalyak.

We would urge the Senate Judiciary Committee to examine as well the transcript of the hearing before Judge Gartner on July 17, 1980, at which Mr. Berger and Mr. Hahalyak successfully opposed the sale of the property of B & B Properties. That transcript reveals a number of important points:

- Mr. Berger and Mr. Hahalyak contend that Judge Gartner's June 19, 1980 order was improper and unfair because (1) it was obtained without notice to them; (2) it required the limited partners to voice any objections to the sale by June 30, 1980, an unreasonably short period of time;* (3) it stated that, without such objections, the limited partners would be deemed to have consented to the sale; and (4) it concluded that "it would be unreasonable for any limited partner of B & B Properties to withhold consent for this sale. . . ."

Mr. Unger's principal response to these allegations at the October 27, 1983 hearing was that his conduct in securing the June 19, 1980 order was not improper because that order gave the limited partners an opportunity to come in and object to the sale if they wished to do so. Thus, it is quite significant that at the outset of the July 17, 1980 hearing on the sale, Mr. Unger attempted to strike the written objections of Mr. Berger and Mr. Hahalyak on the ground that they did not have local counsel representing them. Tr., Unit, Inc. hearing before Judge Gartner, dated July 17, 1980 (attached hereto as Exhibit A), pp. 3-4. Moreover, throughout the hearing Mr. Unger argued that Mr. Berger and Mr. Hahalyak could not object to the sale of B & B Properties because they had no standing in the proceeding before Judge Gartner to object. See id., pp. 5, 7, 10-15, 17, 45-46, 71, 72, 75, 77, 79, 80, 83, 86.**

o Mr. Unger also argued that notice to the limited partners was unnecessary prior to issuance of Judge Gartner's June 19, 1980 order because they were not creditors of Unit, Inc. There is evidence in the July 17, 1980 hearing, however, that the limited partners were in fact creditors of Unit, Inc. and that Unit, Inc. had not listed them as creditors. See id. at 16-17, 19, 45, 51, 89, 90.

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* Although the order was dated June 19, 1980, Mr. Berger and Mr. Hahalyak did not receive it until June 25, 1980, leaving them only 5 days (two of which were Saturday and Sunday) to respond. See Tr., Oct. 27, 1983 (unedited), pp. 31, 34, 149.

** According to Mr. Unger's argument at that hearing, Unit, Inc. was "totally unrestrained insofar as handling B & B Properties," and specifically had "no restraint on their capacity to sell th[e] property[.]" Id. at 12, 13.

- In response to the allegations of Mr. Berger and Mr. Hahalyak that Mr. Unger had unfairly slanted the June 19, 1980 order to make it extremely difficult for the limited partners to raise legitimate objections to the sale, Mr. Unger testified that Judge Gartner, not Mr. Unger, had written the order. See Tr., Oct. 27, 1983 (unedited), p. 142. Many of Judge Gartner's statements and questions about that June 19, 1980 order during the July 17, 1980 hearing, however, suggest that Judge Gartner did not write the order himself. See Exhibit A, pp. 30-31, 46, 73. For example, Judge Gartner stated that "a lot of those findings in that order seem to be a little far-fetched, as far as I'm concerned. How much it affects the validity of the sale, I don't know." Id. at 46. Similarly, Judge Gartner stated

> THE COURT: . . . .
>
> Go back to my order again which, as I had it reread to me, it did sound rather broad there. For example we talk of a finding, this is a fair sale, how do I know that?
>
> MR. UNGER: Well if you would like some evidence, additional evidence --
>
> THE COURT: How do I know that at the time, is what I'm talking about. You probably stopped --
>
> MR. UNGER: I appeared before your Honor, and maybe Mr. Morris, and said that it was a price that in his judgment and our judgment was in excess of market value and the reason was that we can't raise the rents, that we have to go through HUD and the bureaucracy, and I happen to have some personal knowledge of the difficulty of getting things approved, and that it was getting very marginal and that this was a fair price, then I may have said, I don't know . . . .

Id. at 73-74.

V. CONCLUSION.

Nothing in the written or oral testimony of Mr. Unger of October 27, 1983, or in the subsequent materials submitted by Mr. Unger on October 31, 1983, alters the ABA's firm conclusion that the allegations against Mr. Unger are substantiated and that Mr. Unger is not qualified to be a federal circuit judge because he lacks integrity and judicial temperament.*

---

* As the Judiciary Committee is aware, the National Bar Association has submitted a letter for the record correcting any misimpression that it had endorsed Mr. Unger's nomination. See Exhibit B attached hereto.

NBA

Reply to:
4000 Penobscot Building
Detroit, MI 48226
(313) 963-8080

Dennis W. Archer
President

Arthenia L. Joyner
President-Elect

Frank Seales, Jr.
Vice President

Thomas J. Broome
Vice President

Dolores P. Wilson
Vice President

Leroy Wilson, Jr.
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Algenita Scott Davis
Secretary

Walter L. Sutton, Jr.
Treasurer

James R. Haynes
General Counsel

Elliott S. Hall
Parliamentarian

John Crump
Executive Director

[illegible] 3 23

October 24, 1983

The Honorable Strom Thurmond
Chairman, Committee on the Judiciary
The United States Senate
SD-224 Dirksen Senate Office Building
Washington, DC 20510

Re: Nomination of Sherman E. Unger for the Court of Appeals for the Federal Circuit

Dear Senator Thurmond:

Enclosed please find copies of letters to Judge Griffin B. Bell and Senator Hugh Scott relative to the National Bar Association's letter of September 23, 1983 to this Committee.

The record before the Committee indicates that our letter to this Committee may have inadvertently been misinterpreted by witnesses in hearings held on September 29, 1983 as an endorsement of Sherman E. Unger. That interpretation is incorrect as our letter contains no endorsement.

We ask that copies of the enclosed letters be made a part of the record of this Committee on the above nomination.

Sincerely,

Dennis W. Archer

DWA/ls
Encl.

NATIONAL BAR ASSOCIATION INC., 1773 T STREET, N.W., WASHINGTON, D.C. 20009 • (202) 797-9002
59th ANNUAL MEETING • JULY 27-AUGUST 4, 1984 • NEW ORLEANS, LA
Telex: 469510 Cable: NABAR WSH

NBA

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Executive Director

October 24, 1983

The Hon. Griffin B. Bell
2500 Trust Co. Tower
Atlanta, GA 30303

Re: Nomination of Sherman E. Unger for the Court of Appeals for the Federal Circuit

Dear Judge Bell:

It has come to the attention of the National Bar Association that, with reference to the above nomination, you may have inadvertently misinterpreted our letter of September 23, 1983 to the Judiciary Committee of the United States Senate.

The transcript of the hearings for the Committee held on September 29, 1983, at page 174 indicates that you testified as follows regarding the Unger nomination:

> "In fact, the National Bar has endorsed him [Unger]"

The above referenced statement that the National Bar Association has endorsed Mr. Unger is incorrect. We have not endorsed him for the Court of Appeals for the Federal Circuit.

We have not done so for several reasons, all of which are indicated clearly in our letter of September 23, 1983 to the Committee. First, we did not receive notice of the subject nomination from the Department of Justice. This would have permitted us to conduct our own investigation. Secondly, we had no independent information about Mr. Unger which would permit us to take a position on the issues raised by the American Bar Association in its report about the nominee.

Our objective in our letter of September 23, 1983 as stated in the letter, was simply to report to the Judiciary Committee of the United States Senate information regarding the nominee. We took no position on the overall qualifications of the nominee because, as stated earlier, we were not given the opportunity to undertake a broad investigation into this nominee's background. Such an investigation, we believe, is essential before we can, in good conscience, either endorse or oppose a Presidential nomination.

Sincerely,

Dennis W. Archer

DWA/ls

cc: Senator Strom Thurmond